No. 14354

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES H. SEWELL, doing business under the fictitious firm name and style of BURNS CUBOID COMPANY,

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent

Petitioner's Opening Brief on Petition to Review Decision and Order of the Federal Trade Commission.

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FEDERAL TRADE COMMISSION,

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Petitioner's Opening Brief on Petition to Review Decision and Order of the Federal Trade Commission.

I.
STATEMENT OF JURISDICTION.

Under Section 5 of the Federal Trade Commission Act (52 Stat. 111; 15 U. S. C. 45-58), this is a Petition by James H. Sewell for Review of an Order of and proceedings before the Federal Trade Commission, a United States board or commission (Rule 43, Rules, Court of Appeals, Ninth Circuit).

It arises after exhaustion of proceedings by, of, and before that Commission: Decision of the Commission [I R. 170]; Findings as to the Facts (Commission's) [I R. 171-183]; Conclusion (of the Commission) [I R. 183]; and Order (of the Commission) [I R. 183-186].

The proceedings before the Commission were instituted by the Commission (Complaint was issued by the Commission for proceedings before the Commission, on motion of the Commission [I R. 2-8] and referred to a Trial Examiner of the Commission) in February, 1951. At that time, Burns Cuboid Company was a copartnership—and so designated in the Complaint—consisting of James H. Sewell and George Pepperdine [Answer, I R. 14-30]. During the time period of the proceedings, Sewell acquired the entire ownership [I R. 171; II R. 267-268] and hence is the sole petitioner here [R. 187-200; Pet. for Review]. Answer was filed [I R. 13-30] and hearings were held in Washington, D. C., New York, Los Angeles and Chicago.

II.
STATUTES BELIEVED TO SUSTAIN JURISDICTION.

Federal Trade Commission Act, 52 Stat. 111, 15 U. S. C., Secs. 45-58; Review of Federal Trade Commission Order, 15 U. S. C., Secs. 45(c), 45(d), 45(e).

III.
PLEADINGS CITED TO SHOW EXISTENCE OF JURISDICTION.

Complaint [I R. 2-8] (jurisdiction of Commission).

Answer [I R. 13-30].

Petition for Review [I R. 187-200] (jurisdiction of this Court).

IV.
FACTS BELIEVED TO SHOW EXISTENCE OF JURISDICTION.

Petitioner (and predecessor partnership, in Santa Ana, Orange County, Southern District of California) is engaged in manufacturing, offering for sale and selling a device, as "device" is defined in the Federal Trade Commission Act, and has caused these devices to be transported from the place of business to purchasers thereof located in various other States, and since 1947 has disseminated, and is now disseminating advertisements containing representations and statements concerning the device by United States mail and other means, in interstate commerce [Stipulation as to Facts, I R. 5-9; Findings of Commission, I R. 171(a)-174].

V.
SUMMARY OF FACTS.

The gist is alleged false advertising of a device sold in interstate commerce.

The device is a shoe insert, NOT AN ARCH SUPPORT. It is made chiefly of leather and cork, the feature being that while its original top surface is flat, its thickness varies at various points, so that corrugations in the nature of peripheral wedges and pad inserts are built in and are so modified by the pressure of the wearer's foot as to adapt the device to fit the wearer's sole [Com. Ex. 3, II R. 10; Pet. Ex. 1, II R. 100; Pet. Exs. 25 and 26].

The advertising claims and statements are detailed in the Complaint [I R. 4-5]. These are repeated and *numbered* in the Answer [I R. 16-20].

Two types of defenses are interposed: As to one set of advertising claims, truth is the defense. As to a second set of advertising claims, non-user since 1947 was the defense.

As to the second category the proceedings were dismissed [I R. 182, 186], since the Commission found that petitioner Sewell had discontinued such use in 1947, more than three years before the Complaint was filed. Mr. Sewell testified this was to cooperate with the Federal Trade Commission [II R. 654]. The advertising statements voluntarily abandoned by petitioner on request of the Commission were (numbered as in the Answer):

(2) Cuboids strengthen weak muscles and counteract poor circulation [I R. 17].

(4) Cuboids aid circulation [I R. 17].

(6) Cuboids strengthen weak feet [I R. 17].

(10) Cuboids stimulate flow of nervous energy in the feet [I R. 18].

The advertising statements defended by Sewell as true are (numbered as in the Answer):

(1) Cuboids help to *balance your* body weight [I R. 16].

(3) Cuboid *Foot Balancers* [I R. 17].

(5) Cuboids . . . *relieve strain and fatigue* [I R. 17].

(7) . . . the *foot and body balance* . . . Cuboids afford [I R. 17].

(8) . . . the relief from aches and pains Cuboids afford [I R. 17].

(9) Better poise *and balance* replace aches and pains [I R. 17].

(11) Drive away *foot fatigue* with Cuboids [I R. 18].

(12) Enjoy more normal foot action with Cuboids [I R. 18].

(13) They're the modern way *to foot relief*—combining scientific principles of *balance and support* to *lessen fatigue* and help improve your stance [I R. 18].

(14) Now everyone can enjoy better posture, poise and *balance with* Cuboids [I R. 18].

(15) Metal-Free Cuboids [I R. 18].

(16) Especially designed to help you enjoy increased foot health and comfort [I R. 18].

(17) With Cuboids foot pains often disappear as if by magic [I R. 18].

(18) Cuboid *foot balancers* make housework less tiring [I R. 19].

(19) Cuboids help *to distribute body* weight [I R. 19].

(21) The feet are the body's foundation [I R. 19].

(22) Cuboids *balance* this foundation and provide the basis for correct posture [I. R. 19].

(23) The Cuboid bone is the keystone of the outer or weight-bearing arch and its position determines the relative position of every other bone in the foot [I R. 19].

(24) Cuboid metal-free foot *balancers* are scientifically designed to help bring these bones into normal position [I R. 19].

(25) Cuboids afford effective *relief to aching feet* [I. R. 19].

(26) Cuboids afford effective relief to calloused feet [I R. 19]. (Emphasis added to clarify.)

Wherever the claim is that the device will afford relief to *strained, tired feet,* the Commission (by a negative finding) [I R. 182-183] has admitted the truth of the claims, and has dismissed its charges as to these.

The remaining categories of advertising here involved then are:

(1) Claims as to:
   (a) Body balance (including poise, stance and posture);
   (b) Foot balance.

(2) Claims as to relief:
   (a) from aches and pains;
   (b) From callouses.

(3) Claims as to more normal foot action, increased foot health, foot comfort, etc.

These the Commission has held to be all categorically false.

VI.
QUESTIONS INVOLVED.

(1) Was Petitioner accorded a fair trial before the Commission and before the Commission's own Trial Examiner?

(2) Are the Findings of the Commission consistent with its own decision and order?

(3) Was the Trial Examiner biased?

(4) Is there substantial, or any, *evidence* to support the Commission's Findings?

(5) Was it fair (or prejudicial error) to refuse to reopen this Petitioner's defense to hear the offered testimony of Dr. Glassman?

(6) Did the Trial Examiner (and the Commission) give a correct evaluation of the testimony of Doctors Hiss and Garner, *i.e.,* when coupled with the testimony of the Commission's experts, is there *any substantial conflict?*

(7) Purported impeachment of defense witnesses, which, if at all, was impeachment upon immaterial matters, was permitted. This swayed, erroneously, the decision of the Trial Examiner and the Commission.

(8) The entire process, *i.e.,*

(a) The issuance of the Complaint *by the Commission* (which influenced and biased the Trial Examiner);

(b) The bias of the Trial Examiner as reflected in his rulings, decisions, orders and findings (*which influenced the Commission*); and

(c) The prosecution of the entire proceedings before the *Commission's* Trial Examiner, and the *Commission* itself, by the *Commission's* attorney, on the Complaint issued by the *Commission*

all constituted a re-merger of the tribunal powers of the Federal Government at an administrative level in such manner as here to prevent the Petitioner from having been accorded a fair trial and due process.

(9) What is the meaning of "Balance"?

(10) How can the findings as to "balance" be understood?

VII.
SPECIFICATIONS OF ERROR.

A. Of the Trial Examiner.

The Trial Examiner erred:

(1) In refusing to admit [I R. 84] the United States Patent, offered as Sewell's Exhibit 18 for identification, Patent No. 2,287,341 [II R. 282-284].

(2) Upon the offer in evidence (and refusal) of Sewell's Exhibit 19 [II R. 290-295] for identification, in stating that a witness would have to be called to prove the facts which were implicit in the offered evidence; and when an offer of such oral proof by Dr. Glassman, a witness, was made [I R. 78; IV R. 871-880], in refusing to receive such proof and in refusing to reopen Sewell's defense for such purpose [I R. 86; IV R. 871-880] and in holding such offer to be "cumulative."

(3) In refusing to grant Sewell's Motions to Strike from the Record [I R. 34-49, Specifications 1-58 incl.].

(4) In refusing to admit in evidence Sewell's Offer of Proof *re* Exhibits 19-A to 19-Z-259 inclusive [II R. 287-295; I R. 58-70].

(5) In refusing to admit in evidence Petitioner's offered Exhibits 20-A to 20-Z-72 [I R. 72-76; II R. 296-300].

(6) In refusing to permit a letter into evidence or into the Record when a witness had been questioned about it [III R. 357-360]. (Letter *re* pressure on inside arch.)

(7) By overruling Petitioner's objections [III R. 363 *et seq.*, 367].

(8) In gratuitously striking an answer by the witness [III R. 376]. And in summarily, rudely and unnecessarily admonishing an intelligent, courteous witness [III R. 377].

(9) By engaging in an argumentative, arbitrary attitude toward the witness [III R. 382, 393, 395, 406, 420, 424-425, 435].

(10) In refusing to permit the witness to answer [III R. 444-445].

(11) By rejecting Petitioner's offered Exhibit 21 [III R. 505]. (Elftman's work.)

(12) By questioning Dr. Garner's qualifications [III R. 568].

(13) In ruling adversely to Petitioner's clear and sound objection [IV R. 676, 682-684].

(14) By taking, obviously, the side of the Commission's attorney in badgering a witness [IV R. 688-690].

(15) By gratuitously admonishing the witness during cross-examination [IV R. 749-750].

(16) By attempting to keep actualities out of the Record [IV R. 790].

(17) By refusing proper rebuttal questions after immaterial cross-examination [IV R. 799].

(18) By erroneously and ignorantly admonishing counsel concerning leading questions [IV R. 800].

(19) By refusing legitimate rebuttal testimony [IV R. 805].

(20) In failing to apply the same rules of evidence (as to leading questions) to the Commission as to the defense [IV R. 825].

(21) In permitting duplicitous questions [IV R. 833].

(22) In virtually preventing a substantial part of the cross-examination by Petitioner of the Commission's witness Dr. Lewin [IV R. 889-890].

(23) By refusing to permit proper cross-examination [IV R. 904-905].

B. Of the Commission.

The Federal Trade Commission erred:

(1) In finding the device has therapeutic value (by the inverse means of finding that the "greater weight of the evidence adduced in this proceeding does not support a conclusion that respondent's device possesses no value as an aid to strained, tired feet . . ." [I R. 182, 183]) and in simultaneously finding that the "device is not an effective treatment for ordinary foot aches and pains and has no therapeutic value in the treatment of aching or painful feet" [I R. 180], and in inconsistently simultaneosuly ordering [I R. 184] Sewell to cease and desist from advertising that wearing the device "will result in more normal foot action or improved foot action or health."

(2) In making inconsistent findings:

(a) [I R. 178] that in the device "the circumstance that both sides of the device are raised and there is the tendency for these lateral elevations to *balance one another out*" (Italics ours) and, simultaneously,

(b) [I R. 180] that "the use of Cuboids will not assist the wearer to attain *body balance* or *foot balance,* or assist beneficially in the distribution of body weight," and in ordering Sewell to cease and desist from advertising [I R. 184]:

(a) "That the wearing of respondent's device will assist in balancing the feet or body."

(3) In accepting at face value the Commission's Attorneys' and the Trial Examiner's appraisal of Sewell's experts' testimony rather than analyzing it to find its inherent truth, thereby preventing a fair trial.

(4) In failing to see that the Commission's witness Dr. Lewin actually might easily have been the inventor of the device in question.

(5) In failing to give credence to the experiential, pragmatic testimony of lay witnesses.

(6) In failing to accord Petitioner a fair trial.

(7) In failing to base findings upon substantial evidence.

VIII.
ARGUMENT OF THE CASE.

A. Evidentiary Rulings.

These are brought to the Court's attention in Specifications of Error of the Trial Examiner, numbered (*supra*) (1), (2), (3), (4), (5), (6), (7), (8), (9), (10), (11), (13), (14), (18), (19), (20), (21), (22), (23), (24) and (25).

Our specifications above cite the Court to the Record. We hereafter treat them under categories by subject matter rather than by specification numbers.

(i) The Patent.

The Petitioner offered in evidence a United States Letters Patent [Ex. 18 for Iden.; I R. 84; II R. 282-284; Pat. No. 2,287,341].

The patent is that under which the device is manufactured, sold and used. Reference is made to the context of the claims thereof for the purpose as indicated. On page 283 [Vol. II of the Record], the Record shows that it was urged that the patent itself contains a statement, and its claims contain language almost identical with the advertising which is sought to be held false by

the Commission. The United States Government issued the patent and thereby sanctioned the utilization of the language which is contained within the patent. It is the contention of the Petitioner herein that there is only one United States Government, and that the Trial Examiner erred in not admitting said patent into evidence.

(ii) The Doctors' Prescriptions.

In addition to the patent, the Petitioner, before the Trial Examiner, made certain Offers of Proof. The first of these was with reference to Exhibits numbered 19 to and including 19-Z-259, all for identification, as set forth in I R. 58 to 70. These consisted of doctors' prescriptions to patients for use of the device in question, received by retail outlets of the Petitioner in the regular course of his business, upon the basis of which a pair of Cuboids was in each instance sold to a customer.

At II R. 290-295, the offer was made of these documents; at I R. 71-76 a written Offer of Proof concerning these documents was made. They consist of what are apparently prescriptions of doctors, *i.e.,* members of the medical profession, from many varied parts of the country. The testimony on which they were based and upon which admission was sought was that of Mr. Sewell, the Petitioner herein [II R. 285-296]. The evidence was, of course, in one sense hearsay. *It was not offered, however, to prove the truth of any statement therein made.* The documents were identified by Mr. Sewell, the Petitioner here, then on the witness stand and according to his testimony, each and all were received by the Burns Cuboid Company from representatives in the field, and have been received and kept by Mr. Sewell in the regular course of his business, and were presented to sales rep-

resentatives by people who came into get Cuboids. These were, we submit, admissible under either of two well established rules:

(1) Under the Federal Ordinary Business Records Statute, and (2) under the universal exception to the hearsay rule that hearsay is always admissible when offered to prove *what was said* and not the truth of the saying.

(1) Title 28, United States Code, Section 695, is known as the Federal Ordinary Business Records Statute. It provides as follows:

> "695. Admissibility; definition of 'business.'—In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of said act, transaction, occurrence, or event, if it shall appear that it was made in the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term 'business' shall include business, profession, occupation, and calling of every kind."

This has been construed in the case of *Palmer v. Hoffman,* 318 U. S. 109, 87 L. Ed. 645, 63 S. Ct. 477, affirming 129 F. 2d 976, and it is there held that this section should be liberally interpreted so as to do away with anachronistic rules which gave rise to its needs and at which it was aimed; "regular course" of business

must find its meaning in the inherent nature of the business in question and in the methods systematically employed for the conduct of the business as a business.

In *Park v. Metropolitan Life Insurance Company,* 138 F. 2d 123, a New Jersey birth certificate of a child was held admissible to prove the age of the parents recited therein as against the contention that it should be limited to the proof of the birth of the child.

Likewise, in the same case, hospital records reciting the insured's age were held admissible in evidence to prove his age where they were made when the insured went to the hospital for diagnostic purposes.

The offer in this case was made to refute the testimony elicited by the attorney in support of the Complaint that the medical profession all over the United States would have nothing to do with the product.

It did not purport to prove anything else, or anything but that these prescriptions had been received by the respondents in the regular course of its business and each one kept as part of the memorial of a transaction. The fact of their having been received by the petitioner, and not any fact contained, was the fact sought to be proved.

(2) The second theory is found in *Jones on Evidence in Civil Cases* (3d Ed.), Section 300, where we find the following statement of this rule (pp. 455-456):

> " 'It does not follow because the writing or words in question are those of a third person, not under oath, that therefore they are to be considered as hearsay. On the contrary, it happens in many cases that the very fact in controversy is whether such things were written or spoken, and not whether they were true.' "

The Hearing Examiner should have admitted these in evidence, we submit, inasmuch as they show that at least 275 prescriptions have been received by the Petitioner in the course of its business from doctors in many, many parts of the United States. Judging their weight of course would be another matter.

Therefore, we submit emphatically that the Trial Examiner erred prejudically in not admitting these documents, and thereby deprived Petitioner of a fair trial.

(iii) The Testimonials.

At page 296, *et seq.,* the Record reveals that another Offer of Proof was made of a number of lay testimonials [98 sheets numbered Exs. 20-A to 20-Z-72, respectively].

By the same line of reasoning and by the argument as above, these also should have been admitted by the Hearing Examiner, and the fact sought to be proved there is the fact that the unsolicited testimonials form a large background for the advertising which is used.

The Court should, we believe, consider that the Commission is not bound to follow the strict rules of evidence which prevail in courts of law.

> *Stanley Laboratories v. Federal Trade Commission* (9 Cir.), 138 F. 2d 388;
>
> *Phelps-Dodge Refining Corp. v. Federal Trade Commission,* 139 F. 2d 393.

The hearsay rule was instituted originally in order to protect juries from imposition. In a celebrated case, Lord Mansfield called attention to the fact that:

> "In Scotland and most of the Continental states, the judges determine upon the facts in dispute as well as upon the law and they think there is no

danger in their listening to evidence of hearsay because, when they come to consider their judgment on the merits of the case, they can trust themselves entirely to disregard the hearsay evidence, or to give it any little weight which it may seem to deserve. But in England, where the jury are the sole judges of fact, hearsay evidence is properly excluded, because no man can tell what effect it might have upon their minds."

Berkeley Peerage Case, 4 Campb. 401, 11 Eng. Rul. Cas. 310.

Since hearings before the Federal Trade Commission and its very own Trial Examiners are not before a jury, and since the rule of relaxation is the announced rule for the Federal Trade Commission, we again submit that the Trial Examiner (and the Commission) erred prejudicially. We do not believe that either the Trial Examiner or the Federal Trade Commission is at liberty to disregard that which is extremely plain from the evidence. Nor do we believe that either Federal Trade Commission or the Trial Examiner is entitled to exclude proffered evidence and then make findings contrary to the evidence ruled out, when there is no contrary evidence.

(iv) The Dr. Glassman Offer.

Consistent with his unfair attitude, the Trial Examiner, in refusing admittance to Petitioner's Exhibits 19 through 19-Z-259, remarked and ruled [II R. 288]:

"Trial Examiner Haycraft: You would have to prove the truth of those documents in order to prove what they are attempting to prove."

And at II R. 294-295 appears the following:

"Trial Examiner Haycraft: . . . What you are trying to prove is to disprove opinion testimony of

a doctor that no reputable doctor, we'll say, would prescribe Cuboids. Now, if there is going to be any relevancy at all, it must be that some reputable doctor did prescribe it. If that is the purpose of the offer, then counsel for the complaint is entitled to cross-examine the doctor who prescribed Cuboids, and whether he is a man of reputation, and also that the facts were and the surrounding circumstances under which the prescription was granted.

Now, in the absence of that, then the document hasn't any probative value. If the offer is going to be made—we have discussed this before the offer was formally made—if you are about to make a formal offer of respondents' documents 19-A—

Mr. Bellinger: I think he did offer them.

Trial Examiner Haycraft: If that is true, then I am rejecting the offer on the ground it hasn't any probative value in this proceeding."

Taking this in conjunction with Petitioner's Offer of Proof as to the testimony of Dr. Glassman [I R. 78-82 *et seq.*, as ruled upon by the Examiner at [IV R. 875], we find:

> "It is the opinion of the Hearing Examiner that the subject matter of the offer is cumulative and is substantially covered in the testimony of the previous witnesses,"

and in ruling [IV R. 876] that the Petitioner was not permitted to reopen the case.

We respectfully ask the Court to consider this in conjunction with the discussions concerning rebuttal by the Commission [IV R. 812-816] with reference to the attitude of the Trial Examiner concerning the reopening in effect by the Commission.

(v) Refusal to Strike From the Record.

At I R. 33-49 is contained a Motion to Strike, with fifty-eight specifications. These pertain to various categorical statements made by the expert witnesses for the Commission.

It arises from a colloquy and a ruling by the Trial Examiner found at II R. 250, lines 18, *et seq.* There it appears that Petitioner's attorney was asking a witness on the stand a question as to his opinion (he was an expert), and the following occurred:

> "Q. In your opinion, then, Doctor, is the form of the balance correctly and truthfully applicable to the—
>
> Trial Examiner Haycraft: No, we are not going to let the doctor decide that or any doctor, as far as that is concerned. It is a problem for the Commission to decide, after it takes into consideration the testimony, the factual testimony and the opinion testimony of the doctors, whether they result from hypothetical questions or whether it has been related to facts, just as he asked the other question that you just asked, and the witness was properly allowed to answer.
>
> After the Commission has taken the words and compared the testimony they will have to come to a conclusion as to whether the language used in the form is proper. That is not a question that can be answered by one man.
>
> Mr. Maury: I am just asking him, your Honor, for his opinion as to that.
>
> Trial Examiner Haycraft: Well, objection sustained as to that."

Since the attorney for the Commission, throughout the entire course of his interrogation of witnesses produced

by the Commission, had asked altogether similar opinion questions of the experts produced by the Commission, the position of the Petitioner was and is that the same rule should apply with reference to the introduction of evidence by those experts brought forward by the Commission as to the experts brought forward by the Petitioner. The Trial Examiner broke in upon the attorney for the petitioner and categorically denied admittance to the opinion of the witness, as to the properties of the device. Thereafter, when a Motion to Strike was made as to similar questions and answers given by the Commission's witnesses, the Motion to Strike was denied.

B. The Administrative System of the Federal Trade Commission, the Attitude of the Trial Examiner, and the Evidentiary Rulings, Altogether, Denied a Fair Trial.

The attitude of the Trial Examiner toward the Commission's case, as compared with his attitude toward Petitioner's case, was that of a crusader, not a jurist. The Trial Examiner refused to permit into evidence a letter on request of Petitioner when the witness *had* been questioned about it by the Commission [III R. 357-360].

The Trial Examiner twisted the issues by permitting evidence concerning systemic diseases [III R. 363]—entirely outside the issues.

The Trial Examiner gratuitously struck a cogent, enlightening opinion by a qualified expert [III R. 376], and rudely admonished the witness [III R. 377], thereby adding to the badgering of the witness going on by the attorney for the Commission [III R. 377].

The Trial Examiner engaged in an argumentative, arbitrary, sarcastic, angry, unjudicial attitude toward the

witness, which is readily discernible, even in the cold Record [III R. 382, 393, 395, 406, 420, 424, 425, 435].

Even casual scrutiny reveals that the school of thought envisioned and embraced by Dr. Hiss was one that the Trial Examiner would not listen to, did not want to listen to, had not wanted to listen to, and mentally rejected whenever it started to come into the Record.

The Trial Examiner refused to permit the witness to answer [III R. 444-445]; the Trial Examiner required extraordinary evidence of a qualification of Dr. Garner [III R. 568]; the Trial Examiner leaned over backwards to admit evidence on behalf of the Commission [IV R. 682]; the Trial Examiner took the side of the Commission's attorney in threatening to discommode a witness in his anxiety to make a train [IV R. 688-690]; the Trial Examiner exhibited bias by gratuitously limiting a witness' answer to "yes" or "no" when the witness had given a perfectly sensible and clear answer, this during cross-examination [IV R. 749-750]; the Trial Examiner attempted to keep actualities out of the Record [IV R. 790].

The Dr. Dodds (not a witness) there mentioned sat through the entire series of hearings in Los Angeles and coached the attorney for the Commission; and when the attorney for the Petitioner stated, "Mr. Maury: May the record show that Dr. Dodds nodded his head affirmatively?" the Trial Examiner stated: "No, the record doesn't have to show that." The Trial Examiner attempted to keep this actuality out of the Record when, in fact, the actuality occurred in his presence, and there was no tacit or express ruling or understanding that such should be kept out of the Record.

At IV R. 799, the Trial Examiner simply refused proper rebuttal questions after cross-examination. The

Trial Examiner improperly and ignorantly admonished counsel concerning leading questions [IV R. 800], and refused proper rebuttal testimany [IV R. 805-806]. The Trial Examiner admitted leading questions by the Commission [IV R. 825], while virtually, in the same breath, admonishing the attorney for the Petitioner [IV R. 800] against leading questions—thus applying one rule to the Commission's elicitation of evidence and another to the Petitioner's. The Trial Examiner permitted the attorney for the Commission to ask duplicitous questions over the objection of Petitioner [IV R. 833]. The Trial Examiner virtually prevented cross-examination by Petitioner of the Commission's own witness [IV R. 889-890], and in stating that Petitioner's counsel had asked "an absurd question."

The entire process is one which prevents fair trials, and its pragmatic working is most aptly demonstrated here. The re-merger at "a lower level" of the tri-unal powers of the Federal Government has been the subject of many criticisms of the administrative process. In this case it engendered a "bootstraps" device by which the Federal Trade Commission has lifted itself with a rope of words to a point where it now austerely finds that the representations of the Petitioner's advertisements are untrue.

Woodrow Wilson, then President, in 1913 conceived the idea of a trade commission to implement certain legislation then being considered by Congress. His purpose was to meet businessmen half way. He intended this Commission to be an agency which would *help* businessmen understand the antitrust laws and the conduct required to comply with those laws. On January 20, 1914, he sent a message to Congress in which he asked it to

create an "interstate" trade commission. President Wilson's message to Congress shows the type of agency he had in mind:

> "The business of the country awaits, has long awaited and has suffered because it could not obtain, further and more explicit *legislative* definition of the policy and meaning of the existing antitrust law. . . . Surely we are sufficiently familiar with the actual processes and methods of monopoly and of the many hurtful restraints of trade to make definition possible, at any rate up to the limits of what experience has disclosed. These practices, being now abundantly disclosed, can be explicitly and item by item forbidden *by statute* in such terms as will practically eliminate uncertainty, the law itself and the penalty being made equally plain.
>
> "And the businessmen of the country desire something more than that the menace of legal process in these matters be made explicit and intelligible. They desire the advice; the definite *guidance and information* which can be supplied by an administrative body, an interstate trade commission.
>
> "The opinion of the country would instantly approve of such a commission. *It would not wish to see it* empowered to make terms with monopoly or in any sort to *assume control of business,* as if the Government made itself responsible. It demands such a commission *only as an indispensable instrument of information and publicity,* as a clearing house for the facts by which both the public mind and the managers of great business undertakings should be guided . . .
>
> "Inasmuch as our object and the spirit of our action in these matters is to meet business half way in its processes of self-correction and *disturb its legitimate course as little as possible,* we ought to

> see to it, and the judgment of practical and sagacious men of affairs everywhere would applaud us if we did see to it, that penalties and punishments should fall not upon business itself, to its confusion and interruption, but upon the individuals who use the instrumentalities of business to do things which public policy and sound business practice condemn." (51 Cong. Rec. 1962-1963 (1914).) (Emphasis added.)

Acting upon that recommendation in the Fall of 1914, the Congress passed the Federal Trade Commission Act. At the same time it passed the Clayton Act, which contained the results of its own study. (The Federal Trade Commission Act was approved September 26, 1914 [38 Stat. 717]; and the Clayton Act was approved October 15, 1914 [38 Stat. 730].)

President Wilson wanted a legislative definition of the policy of the statutory law and an administrative agency "only as an indispensable instrument of information and publicity." Rejecting administrative control of business, he wanted the Congress to define the laws. The Commission's function was to be only to publicize, and inform businessmen of, the requirements of those laws. He intended to "disturb the legitimate course [of business] as little as possible." The Commission, however, over the years has become a Court, specialized as is the Tax Court, not an agency such as President Wilson conceived.

In 1950, more than thirty-five years after President Wilson's message outlined the Commission's function, a report of the Senate Interstate and Foreign Commerce Committees found that:

> The Commission does not consider itself a body such as that envisioned by President Wilson. In the

> hearings before this subcommittee, the Commsision has taken the position that it cannot indicate, in advance of specific litigation before it, the rules of law applicable to business in interstate commerce. (Sen. Rep. No. 2627, 81st Cong. 2d Sess. 5 (1950).)

After an exhaustive study of the Commission, the Hoover Commission in 1949 made comprehensive findings of its performance record. Reviewing the purpose intended in the creation of the Federal Trade Commission, the Hoover group said that "over the years, the Commission has engaged mainly in activities contributing little toward accomplishing the primary Congressional objective of assuring widespread effective competition." (Hoover, Task Force Report on Regulatory Commissions 122 (1949).)

The Hoover group restated the obligation imposed on the Commission by the Congress with the conclusion that "the Commission also has responsibilities for furtherance of the policy and mandate of the statutes. In a field of such public interest, the Commission has a duty to be truly informative, concerning its own standards and policies." (Hoover, Task Force Report on Regulatory Commissions 131 (1949).)

The Commission's advice to businessmen is that they can learn the business conduct required of them by the statutes only when the Commission chooses to sue them and to litigate the propriety of their business activities in an adversary proceeding. As a result, no one knows what is now the law in this field. The Commission has refused to assist businessmen to understand the law.

Freight absorption has been the subject of inquiry of a special Senate subcommittee in 1950 which inquired into

the extent to which the Commission qualified the law on that subject. The Senate committee found that "much of this confusion—conceded by everyone to exist—is directly attributable to the Federal Trade Commission." (Sen. Rep. No. 2627, 81st Cong., 2d Sess. 11 (1950).)

The Senate then asked the Commission for a formal expression of when freight absorption is lawful under existing statutes.

The Commission advised the business world in November, 1950, that freight absorption is lawful whenever it isn't unlawful. "The legality of freight absorption which has no unlawful purpose or effect is clear today. Such freight absorption has not been attacked by the Commission in any proceeding, and the Commission has repeatedly made public announcement that such freight absorption is legal." (Letter reprinted in Sen. Rep. No. 2627, 81st Cong., 2d Sess. 22 (1950).)

The Committee made the following closing comment:

> "We are somewhat surprised at being told by an agency that the legality of anything which has 'no unlawful purpose or effect' is clear. Obviously, anything that is not illegal must be legal. The Commission could equally properly have said that killing a person is not unlawful if it 'has no unlawful purpose or effect.'" (Sen. Rep. No. 2627, 81st Cong., 2d Sess. 9 (1950).)

We do not wish unduly to belabor the Court with a discussion of the Federal Trade Commission. In the instant case, the Complaint was made by the Commission (for filing and hearing before the Commission) upon the sole ground that the Commission "had reason to believe" [I R. 2] that Petitioner [predecessors] was violating the law. The bootstraps device is apparent from there

on: The Petitioner here was granted no right to have his side of the story examined before the Complaint was issued against him. True (and not appearing in the Record) there were negotiations toward a stipulation, but those did not bear fruition.

Hearings were then held before one of the Commission's very own Trial Examiners. The attorney who appeared to support the Commission's Complaint was on the Commission's staff. The evidence was voluminous. The Examiner (*a servant of the Commission and previously a prosecutor before it*) was necessarily influenced by the fact that the Commission "had reason to believe" that there was a violation of law.

The Hoover Commission found, among other things, that the Commission's "dockets were preoccupied with false and misleading advertising cases." (Hoover, Op. cited *supra* under 8, at p. 122.)

It is quite probable that the Commissioners cannot, under the circumstances of the work required of them, examine the lengthy record in each case to reach independent conclusions as to the facts.

In the instant case, only three Commissioners sat to hear the argument before the Commission [I R. 186], and obviously only these three could have made the decision, so there, in itself, the Petitioner was deprived of the consideration of two of the Commissioners.

The Honorable James M. Landis, once clerk to Justice Brandeis and later a member of the Federal Trade Commission itself, and later a member of the Securities and Exchange Commission, and for a decade Dean of the Harvard Law School, recently wrote:

> "I share completely these criticisms of administrative regulation, but two other points should be made.

> The first is a noticeable decline in the quality of the personnel of the top level of bureaucracy that has the responsibility for this administrative regulation. This fact was commented on again and again in the reports of the Hoover Commission. Whether that is something innate to the processes of government or not, I do not know. But the fact is too patent to be denied. Secondly reference must be made to what I would call the utter bankruptcy of the Federal Trade Commission. As a practical matter the deterioration of that Commission has gone beyond the possibility of redemption. If duties of this kind are to be thrust on some agency, there is really only one thing to do, and that is to wipe out the FTC completely and start afresh." (Landis, Monopoly and Free Enterprise 548 (1951).)

On January 24, 1951, speaking to the New York State Bar Association, then Federal Trade Commissioner Lowell B. Mason said:

> "Clyde Reed, the late distinguished Chairman of the Subcommittee on Independent Office Appropriations, once characterized the Commission as having dried up and blown away, an entirely unfair and inaccurate description of us, because as a matter of fact, we have not blown away."

The Supreme Court, however, is said to consider the Federal Trade Commission to be "a body of experts." In *Federal Trade Commission v. R. F. Keppel & Bro.*, 291 U. S. 304 (1934), the Court quoted from the 1914 Congressional Committee Reports that the Commission was to be "a body specially competent to deal with [unfair competitive practices] by reason of information, experience and careful study of business and economic conditions," and that it was organized to "give to [the Com-

mission] an opportunity to acquire the expertness in dealing with these special questions concerning industry that comes from experience" (p. 314).

Some fourteen years later, in the so-called *Conduit* case (*Triangle Conduit & Cable Co. v. F. T. C.,* 168 F. 2d 175, 180 (7 Cir., 1948)), the Court of Appeals said that "Congress has left to the Commission the determination of the facts . . . and the weight to be attributed to the facts proved and the inferences to be drawn from them."

In the case of *Federal Trade Commission v. Cement Institute,* 333 U. S. 683, the Court referred to the Commission's long and close examination of the questions in issue and its specialized knowledge which Congress wanted its agency to have and the Court talked about these "men trained to combat monopolistic practices" (p. 726), and said (p. 720):

> "We are persuaded that the Commission's long and close examination of the questions it here decided has provided it with precisely the experience that fits it for performance of its statutory duty. The kind of specialized knowledge Congress wanted its agency to have was an expertness that would fit it to stop at the threshhold every unfair trade practice—that kind of practice, which is left alone, 'destroys competition and establishes monopoly.' "

Contrary to the opinion of the Supreme Court, Mr. James M. Landis, while Dean of Harvard and four years after leaving the Commission, wrote:

> "To assume that any five, ten, or twenty men have the ability to acquire, within their brief official lifetime, the expertness to comprehend the full range of our industrial problems, from aluminum to

> zinc, is once more to put our trust in supermen. In the business of governing a nation—to paraphrase Gerard Henderson again—we must take into account the fact that government will be operated by men of average talent and average ability and we must therefore devise our administrative processes with that in mind." (Landis, Administrative Process 87 (1938).)

The Hoover Commission found that the Federal Trade Commission had been hampered by mediocre appointments and that its operations, programs, and administrative methods have often been inadequate and its procedures cumbersome, and that it has largely become absorbed in petty matters rather than basic problems. The Hoover group also reported as to the Federal Trade Commission that "with notable exceptions, appointments to the Federal Trade Commission have been made with too little interests in the skills and experience pertinent to the problems of a competition and monopoly, and too much attention to service to political party." (Hoover, Op. Cit. *supra,* p. 125.)

Such was the situation here that despite evidence of their *own experts* on cross-examination, which tended to prove that the advertising was true, the Trial Examiner and the Commission both chose to base their decisions upon the categorical one word opinion answers of their experts' testimony in chief.

These mere parrot-like categorical opinions of the three Arlington doctors must fall before the analytical detailed statements given by them on cross-examination.

> "The testimony given by a witness on cross-examination is the evidence of the party in whose behalf he is called and the cross-examiner has the right to

bind his adversary with the truth elicited from his own witness. (Wilson v. Wagar, 26 Mich. 457; Campau v. Dewey, 9 Mich. 417; Chandler v. Allison; 10 Mich. 460; N. Y. Mine v. Negaunee Bank, 39 Mich. 644)."

Heard v. United States (8 Cir.), 255 Fed. 829, 832.

An expert witness' testimony, even though uncontradicted, must be evaluated as a whole, *including qualifying statements and admissions on cross-examination.*

Koshland's Estate v. C. I. R. (9 Cir.), 177 F. 2d 851.

"While the jurors are the sole judges of the facts, the question as to whether or not there is substantial evidence in support of the plaintiff's case is always a question of law for the Court (Grant v. Chicago, etc. Ry. Co., 78 Mont. 97, 252 Pac. 382), and in determining this question, the *credulity of courts is not to be deemed commensurate with the facility and vehemence with which a witness swears.* It is a wild conceit that any court of justice is bound by mere swearing. It is *swearing creditably* that is to conclude judgment . . ." (Emphasis added.)

Morton v. Mooney, 97 Mont. 1, 33 P. 2d 262;

Herbert v. Lankershim, 9 Cal. 2d 409, 472, 71 P. 2d 220.

While the Arlington doctors all gave negative, parrot-like opinions on their testimony in chief, on cross-examination they all expressly admitted the truth of Petitioner's advertising claim.

We believe the following excerpts from the Arlington doctors' respective cross-examinations show beyond peradventure that our controversial advertising claims are all

true, and the Trial Examiner [and the Commission] both disregarded the rule that the burden of proof was on the Commission.

Thus under the foregoing authorities, and under the following testimony (of the Commission's own doctors), there was not only a failure of proof as to falsity, *i. e.,* no substantial evidence to support the findings, either of the Commission or of the Trial Examiner, but positive proof of the truth of our claims:

C. The Evidence of Commission's Experts on Their Case in Chief Proved the Truth of the Advertising Claims, During the Case in Chief.

DR. ENGH (for the Commission) [II R. 39-40]:

"Q. Now, Doctor, you made the statement several times throughout the course of your testimony, I believe, that the device might help somebody if the metatarsal elevation happened to be correct. Now, will you explain how that is? A. Well, the metatarsal elevation is the elevation in the front part of the foot, in the region of the ball of the foot. It is here (indicating).

Mr. Maury: The witness is indicating Exhibit 3.

Trial Examiner Haycraft: Which end?

Mr. Maury: The end that is not marked. One end is marked '3.' He is indicating the unmarked end.

Trial Examiner Haycraft: All right.

The Witness: On this cuboid support we can see that there is an irregular elevation.

Now, on the average human foot, the depression of the metatarsal arch might not follow that particular pattern. As I explained before, it may be in the region of the first metatarsal head or the second

or the third metatarsal heads, or it could be in the region of the fifth metatarsal.

Now, if perchance this portion (indicating) of the support should strike the portion of the metatarsal arch which requires building up, then this would give that patient some relief."

[II R. 41, line 3, to 47, line 7]:

"Q. Now, Doctor, you said there was a great connection and a very important connection between foot balance and body balance. A. Yes.

Q. Then, now, will you expand upon that subject, will you explain what you mean by your statement distinguishing between foot balance and body balance, those two terms? A. Well, now, when you speak of body balance, you are speaking of the entire human system. Foot balance deals only with balancing the foot.

Q. Good, and the balancing of the foot is the —is what? What is it, Doctor? A. Well, it is the maintenance of good equilibrium through neuromuscular control through the muscles and other structure of the foot, through nerves.

Q. Well, now, isn't that body balance? A. Well, foot balance and body balance are not the same.

Q. Well, that is what I am seeking to elicit, that is what is foot balance and what is body balance? A. foot balance is balance of the foot; body balance is balance of the entire human body.

Q. In other words, if I may say so, the foot balance is the balancing of the foot upon its sole and its heel, isn't that correct? A. Yes.

Q. And the body balancing is the balancing of the entire body up from the foot, from the tibia or

leg bone and up? A. Well, body balance takes in the entire body, including the feet and legs.

Q. I would like to have the distinction clear between the two terms that you use. One of them has reference, I think, if I am correct, to the balancing of the foot upon the surface upon which one is standing; and the other, namely, body balance, has reference to the balancing of the body upon the foot and up, is that true or not true? A. Well, I think I am not making myself clear to you. When I speak of a person having good body balance, I am speaking of the entire body, including his feet, so you cannot speak of body balance as being balancing of the upper part of the body upon the feet. I speak of body balance as complete balancing of the body.

Q. Well, body balance includes foot balance, is that your conception? A. Yes.

Q. Now, then, the foot is not perfectly flat on the surface is it, under the surface? A. No.

Q. For example, the heel is rounded, is it not, on the under surface? A. Yes.

Q. And the heel is at one end of the foot and as you move further along the foot you have the outer side of the foot which forms the surface upon which the person is standing, and you also have the inner side of the foot? A. Yes.

Q. And the inner side is what you describe as the longitudinal arch, that is where the longitudinal arch is? A. Yes.

Q. And then after passing forward from that, if you are examining the foot, after you pass the arch you come to the metatarsal heads which are what is known as the ball of the foot? A. Yes.

Q. And after that there are the toes? A. Yes.

Q. Right. Now, will you describe for the record dynamically how the weight of the body is distributed upon the foot as a person walks? A. Well, the weight of the body is first thrust on the heel and then as he goes forward the weight is taken through what is known as the midtarsal bones and the bones in the midportion of the foot, and then on through the metatarsal area and through there into the toes. In walking forward there is very little weight taken on the midtarsal area, it is distributed almost immediately on the first and fifth metatarsal heads and there is practically no weight borne on the toes.

Q. Now, then, the heel is what we call the calcaneus, is it not? A. Yes.

Q. And the metatarsal heads are the low parts of the foot? A. Yes.

Q. And the arch between the heel and the metatarsal heads is the upper part of the foot, the upper part of the bottom of the foot, is it not? A. That is right.

Q. In other words, the structure of the foot longitudinally or lengthwise is somewhat arch-shaped? A. Yes.

Q. Now, when the weight of the body is upon the foot, where is the focal point of the weight borne? A. The heel.

Q. Through the calcaneus? A. Through the talus, the calcaneus, the heel bone.

Q. And as the body weight moves forward, the weight is transferred forward—now, what is the keystone of the arch? A. The talus.

Q. The talus? A. Yes.

Q. And what is next to the talus—will you describe the cuboid bone in detail? A. Well, the cuboid bone is an irregularly shaped bone located

between the calcaneus and the fifth metatarsal bone. It articulates with various other bones, the fifth metatarsal and the fourth metatarsal bones. It articulates also, with the calcaneus, that is the heel bone and to a very slight degree, I believe, with the scaphoid.

Q. In general, the cuboid bone is shaped somewhat similar to, roughly, to a cube, is it not? A. Yes.

Q. Hence, its name. As a person stands up on his toes, as distinguished from flat-footed, there is a tension, is there not, to the sole of his foot? A. Yes.

Q. Or rather to the ligaments, the leverage falls on the tendons, does it not? A. The ligaments and the tendons.

Q. And the bones act as the structure upon [which] the forces of the muscles operate? A. The forces operate on the bones, chiefly.

Q. There is a tension between the metatarsal head and the heel and up the leg when a person stands on the soles? A. Yes.

Q. That is, a tendency to pull in the metatarsal heads toward the heel? A. To a slight degree.

Q. Very slight, but at the same time there is such a tension because of this articulation which you have mentioned, that is, the articulation of the cuboid with other bones, there is such a tendency, slightly? A. Yes.

Q. And when a person is standing flat on his heels and toes the tension will be the other way, will it not? A. That is right.

Q. In other words, when you stand up the longitudinal arch tends to draw its ends together? A. Yes.

Q. And when you stand the other way, the arch tends to flatten out? A. Well, I wouldn't say the arch flattens.

Q. I say it tends to, I did not say that it flattens. In other words, the ends stretch? A. Yes.

Q. It is something like a bow and arrow, isn't it, when you put a strain the ends of the bow come together and when you release it, the ends go apart? A. Yes, but that is so slight that it is almost negligible, because you have a boney arch, you can't follow the description of a bow and arrow.

Q. It is analogous, but of course the analogy is not perfect. I understand that. I was using it as illustrative to the point; but there is there motion? A. Yes.

Q. Which is in the foot; in other words, the foot flattens out slightly? A. Yes.

Q. And, of course, that is constant process, this arch rising and falling, is that not true? A. Yes."

[II R. 51, line 20, to 51 [2d] line 22]:

"Q. Now, Doctor, you testified in your direct that sometimes there was relief of pressure which could be effected by the cuboids. Would you explain that? A. Well, I explained that. If the elevation in the metatarsal area struck—that is, if the device happened to strike behind the area that is being depressed in the metatarsal area, then the patient will be afforded some relief.

Q. Well, how does that happen that the patient does obtain that relief, psychologically or physically or in any other manner? Will you tell us how that relieves it? A. Well, in the region of the metatarsal head you have a certain amount of flexibility, you can take the metatarsal heads and push them up and down.

Q. That does not explain to me how this pad under the metatarsal head will relieve the pain there. I would like to know that. A. It relieves pain by taking pressure away.

Q. Taking pressure off the head? A. That is right.

Q. And transferring to some other portion of the foot? A. That is right.

Q. And that relieves the pain? A. That is right.

Q. Now, the pressure, of course, that produces the pain is registered in the brain by the nervous system, isn't it? A. Yes.

Q. And it is the pressure on the nerve ends that is relieved? A. Yes."

[II R. 54, line 23, to 57, line 8]:

"By Mr. Maury:

Q. I will call your attention, Doctor, to this diagram, which is Exhibit A, attached to the answer of the respondents, will you examine it, sir? A. Yes.

Q. Can you tell us whether or not, in your opinion, those arrows indicate the movement of the pressure of the weight on the sole of the foot as a normal person walks forward and the relative heaviness of the arrow indicates the relative amount of weight? A. No, I think that is an incorrect statement, I don't think that it indicates the amount of weight that is falling on the foot.

I think it might indicate the amount of compression that it gets, that is, upon the soft tissues.

Q. That is, you do not admit that this diagram correctly describes as nearly as it can be graphically described, the progress of the weight bearing of a foot as a person takes a step? A. Yes, it does

indicate the progress of weight bearing but not the amount of weight bearing.

Q. And the pressure lines in the diagram, assuming that these lines are pressure indications and are supposed to represent the weight relatively to the heaviness, the heavier lines representing the heavier weights—it is your opinion they are incorrect? A. Yes. The amount of weight which is borne on the soft tissues is not analogous to the amount of weight which is borne on the boney arch.

Q. Which is to say, this more nearly represents the weight borne on the arch or the weight borne on the soft tissues? A. The weight borne on the soft tissues.

Q. Does that truly represent, then, the relative weight borne on the soft tissues as one takes a step forward? A. Yes.

Q. Now, the soft tissues, of course, underlie the foot, do they not? A. Yes.

Q. And they are composed of the skin and the various other tissues which you have described, the muscles and tendons? A. Yes.

Q. Including all of the other components of what we designate ordinarily as flesh. And it is on those soft tissues and the boney structure that the weight falls, to a greater or lesser degree? A. Yes.

Q. And this does, then fairly represent the transmission of weight as it is on the foot's soft tissues? A. No, I can't agree with that because I believe I have answered that question once already, that the impression does not indicate the amount of weight that is borne. I will say that the weight is transmitted through the soft tissues to the bone, but it does not indicate the amount of weight which is borne because you have some cavities that are present in

the inner longitudinal arch and you would have no way of knowing how much weight is being borne in that particular area. That indicates the weight pressure on the soft tissues, it does not indicate the weight pressure on the boney arch.

Q. I see, but it does fairly indicate the weight pressure on the soft tissues as the person steps forward? A. Yes."

[II R. 60, lines 5-12]:

"Q. Doctor, I think you indicated that in certain exceptional or unusual cases you could conceive of some slight relief where a device such as cuboids might influence the pressure on the metatarsal area, isn't that correct? A. Yes.

Q. Now, what would you say as to whether or not that possible relief would be temporary or permanent? A. As a rule it is temporary. It could be permanent."

[II R. 62, lines 4-12]:

"A. Well, the average person wears the heel a little to the outer side. As far as the sole of the shoe is concerned, it varies too much to be able to state which side wears the most. In examining shoes, and I have examined the soles of practically the shoes that I see, it has been my impression that where the feet are normal, the sole is worn equally, with the heel a little to the outer side.

Q. The heel on the outer side, and the sole equally? A. Yes."

Dr. Masterson (For the Commission).

[II R. 68, line 19, to 69, line 8]:

"Q. In your opinion, Doctor, what sort of foot trouble, if any, would be benefited by wearing the

Cuboids? A. Well, there might be an occasional case with a small metatarsal elevation and elevations in the cuboid and scaphoid area where, through a happy circumstance, that happened to be an exact fit, where with a mild metatarsal depression in the region of the third metatarsal head, it could help.

Q. What extent would that help be? A. Well, if it happened to fit right, it may give the patient a fair amount of relief.

Q. By easing the pressure? A. By easing the pressure.

Q. Would that mean that it throws that pressure elsewhere on the foot? A. No, not necessarily."

[II R. 72, line 25, to 73, line 12]:

"Q. Could the wearing of Cuboids be of any help in obtaining body balance or foot balance, in your opinion? A. I don't see how—It might in a rare instance, but as a rule, no.

Q. Well, what sort of a rare instance do you have in mind? A. Well, if there happened to be a real, good fit and an actual need for some balance in the metatarsal area, this might, all other factors being considered, it might help in an occasional case.

Q. Well, you say 'actual need.' Who could determine the question of that actual need? A. I feel that that should be determined by a man who is well trained and versed in foot pathology."

[II R. 73, line 5, to 85, line 6]:

"Q. Now, let us go into this 'happy circumstance' which you mentioned, where you said that sometimes the use of this device might aid in relieving a metatarsal pressure situation. Will you explain that thoroughly to the Commission? A. Well, if it happens to fit correctly and the particular person hap-

pened to have a foot which was adapted to this device, then the position of this metatarsal pad might hit the right spot, but that certainly would be asking for a lot of coincidences to occur, which we cannot ask for, as a rule.

Q. Now, Doctor, I will draw your attention to the elevation in this Commission Exhibit 3 here (indicating), the one beneath the cuboid bone, when pressure is put on that; do you understand that that falls into a depressed or concave pattern? A. Yes.

Q. And what effect does pressure upon the cuboid bone have— A. I wouldn't say it had any.

Q. Wouldn't you support that area slightly? A. What for?

Q. I didn't ask you what for; I said does it or does it not tend to support that area underneath the cuboid and the anterior end of the fifth metatarsal? A. *It is practically balanced by your support on the other side.*

Q. The support given by the cuboid? A. No. You have got one on each side, so that they almost negate themselves.

Q. How do you mean, 'negate themselves'? A. Well, I mean if you put a one-inch lift on one side and a one-inch lift on the other side and put them together, you still have not raised them, or very little, if you are trying to elevate one side or another.

Q. I don't think you are answering my question. Doesn't it support— A. I don't feel that it does.

Q. You do not feel that it support to the benefit of the cuboid and the fifth metatarsal? A. I don't feel that it does.

Q. What does it support? A. It doesn't support anything.

Q. It is underneath the foot? A. It is underneath the foot.

Q. And you say it does not support it? A. I don't feel it does.

Q. But the foot rests on it? A. The foot does rest on it.

Q. And if it did not support— A. But it also rests on the other lift that you have on the other side.

Q. Well, isn't that supported? A. The two *balance each other,* and I feel that they don't support." (Italics ours.)

[II R. 86, line 14, to 87, line 19]:

"Q. Now, Doctor, in the course of that step does the cuboid bone hear any of the weight of the body? A. It bears the same amount of weight, I would say, as any of the other bones of the foot.

Q. The foot is adjusted so that the weight is distributed? A. That is right.

Q. And if that is out of place, the foot will be uncomfortable, will it not? A. That is right.

Q. The cuboid bone is shaped roughly as a cube? A. That is right.

Q. And, in fact, it is sometimes referred to as the keystone of the arch? A. No, I believe you are misquoting somebody, or, I am not acquainted with your quotation. I believe the one I am familiar with and have been taught in school is that the naviculus is the keystone of the arch.

Q. Now, how many arches does the foot have? A. Well, it can be broken down into several.

Q. Well, break it down. A. Well, some people feel that there is the longitudinal arch which we have already discussed, and that is considered by most of

us, in my opinion, as the most important and which is also the anterior or metatarsal arch; and some people also speak of the longitudinal arch as being in two parts, an inner longitudinal and an outer longitudinal. The inner longitudinal which they describe I have already discussed, and the outer is composed of the os calcis, the cuboid and the cuneiform and the fifth metatarsal.

Q. That is the outer arch? A. Yes."

[II R. 97, lines 14-23]:

"Q. Well, let us assume a person is wearing shoes which are ill-fitting and then changes to a pair of shoes which do fit him, would it be your opinion that the second pair of shoes will have helped that fatigue? A. Yes.

Q. And if he has less fatigue that would result in less aches and pains over the body and that would affect his poise and balance, won't it? A. He would have better balance; as far as poise is concerned, you will have to define that."

Dr. Mosiman (for the Commission) [I R. 110, lines 7-12]:

"Q. What relationship does the cuboid bone have to the balancing of the foot? A. Well, it is one of the several major bones of the foot which entered into foot motion and therefore in some degree into foot balance, but it is no more important than a good many other bones."

[II R. 114, lines 20-25]:

"Q. What are the most appropriate places on the foot for weight bearing, in your opinion? A. Well, the entire sole of the foot is adapted for weight bearing but usually in the normal foot action, less weight

is borne on the medial side of the foot than on the ends of the toes and heels *and lateral side of the foot.*" (Emphasis ours.)

[I R. 125, line 19, to 129, line 17]:

"Q. Then, as I understand it from that, the surface that the foot walks on is a very important factor as to whether or not the person will have foot trouble? A. Yes, that is right.

Q. Now, isn't it likewise true of foot balance, that the surface the person walks on and its contour is important to foot balance? A. Yes, with certain modifications.

Q. Will you state the modifications? A. Well, we wear shoes; our ancestors did not, and although one sees a considerable amount of foot disability in people who don't wear shoes, still the walking on soft ground is a drastically different matter from walking on stony ground and hard floors, and those surfaces may give cause, or should be considered.

Q. Yes; so that the surface that the person walks on is important; and that surface is the inside of the shoe, isn't it? A. That is true.

Q. And if that does not conform to the surface of the foot, what is the result? A. Well, usually it does not conform to the surface of the foot, with happy results.

Q. With 'happy results,' why is that? A. Because a smooth surface without inelastic molding in it is best, and the inside surface of the shoe may be that, so that people with that type of shoe get less trouble than the others.

Q. And what are the others— A. Well, as I mentioned, a shoe with a filler which models to the foot very frequently will cause trouble because the modeling becomes inelastic and gives the patient a considerable amount of pain.

Q. Then, as I understand it, a new shoe should be more comfortable than an old shoe. A. Providing it fits properly.

Q. Well, supposing it doesn't fit properly, will it be more comfortable to wear a new shoe or a shoe that was worn for a long period of time by the same wearer? A. Well, that is within the limits of properly fitting the new shoe; then the new shoe will be more comfortable than the one which has an uneven sole and has been worn.

Q. It seems to be the type of shoe that you start with. It is your testimony, then, that the new shoe will be more comfortable than the old shoe? A. Yes. Let me arrange that a little, if I may.

Q. Please do. A. We were talking about shoe soles which model to the foot.

Q. Yes. A. And then we came to new shoes and old shoes.

Q. That is right. A. A good quality shoe will not model to the foot and an old shoe will be fully as comfortable and probably more so than a new shoe if the fit is the same.

Q. Why will the old shoe be more comfortable? A. Because the leathers will be softened with use and have more elasticity and give.

Q. And will be adapted more to the shape of the foot; is that it? A. To the top surface of the foot.

Q. You mean the bottom surface or the top surface of the sole? A. No, indeed, I wasn't speaking of the sole, I meant the upper portion of the foot. Now, if I may give an example.

Q. Please do. A. I have a pair of shoes which are fairly new and which are pinching a toe. Now, in a few weeks' time they will not pinch me as much as they do now on the top surface of the foot.

Q. Now, this statement you made about a person walking on bare ground, or I believe you used the term 'soft ground,' let me inquire a little bit into that.

Will you tell me the difference between walking on bare ground and walking upon sidewalk, and so forth? A. Well, the difference in that is that ground, generally speaking, with the exception of rock, gives somewhat to the foot and there is more resilience, particularly as the person steps down on the heel and when the full weight of the body is borne or the shock, as the heel hits on the bare ground than on the pavement, and that resiliency is particularly apparent in the difference between people who don't wear shoes and people who do.

It is the reason, for example, along with other mechanical reasons, why a man running finds it much more satisfactory to land on his toes than on his heels.

Q. That is, as I understand it, on the bare ground with bare feet, when the heel will press on the ground first; is that right? A. Ordinarily speaking, yes.

Q. There is more resiliency on the ground, unless it is rock, you say? A. Yes.

Q. And as the step is further taken, the weight is transferred forward on the foot? A. At the moment of step-off, it is true.

Q. Yes, the amount of the step-over or step-off, the weight moves over to the metatarsal area? A. And the toes, yes, sir."

[II R. 130, line 13, to 133, line 16]:

"Q. Now, is it true that many backaches and leg pains or even some classes of headaches are caused by trouble with the feet? A. I think that is true; yes, sir, that is right.

Q. And you have already testified that many foot troubles originate in improperly fitted shoes? A. Yes.

Q. Now, is it true that callouses, in the ordinary lay language, are caused by frictions? A. Yes.

Q. That is, the rubbing of the shoes, or what have you, on formation? A. May I say a little about that?

Q. Yes, sure. A. Not only the rubbing of the skin against the sole, but—it may be caused, for example, by the rubbing of the skin against the rake handle, but also by rubbing of the bone internally against the skin through the sole pad.

Q. Yes. It is the rubbing of the two hard surfaces on a soft surface? A. Yes.

Q. And nature protects the soft surface by the growth of the callous, and the callous is usually produced by that need? A. Yes.

Q. Now, callouses will be largely produced on what area on the foot? A. Frequently in the metatarsal region, that is, up under the base of the toes and also frequently on the tops of the toes—you have corns then.

Q. That is, when the shoe is rubbing on the top of the toe? A. Yes.

Q. Well, that is not part of the weight factor, is it? A. No, that is pressure of the shoe.

Q. But, the callouses on the sole of the foot are from the weight factor; isn't that so? A. That is right.

Q. Now, is it not your custom, in your diagnosis of foot troubles, to find that they require some sort of a support at various points? A. Yes, definitely.

Q. And what different types of support do you use? A. Well, we usually have a combination of

supports. It depends entirely upon the patient's foot, you understand.

Q. Sure I understand. A. Some people need no support inside the shoe whatsoever; a wedge in the sole or in the heel may suffice to make the alignment, whereas with some other people, particularly those who have callouses, they very frequently need temporarily a support within the shoe to relieve pressure from the area of the callous. That can be done by any one of several types and some of them are made of rubber or cork and sometimes we use a felt pad with a hole in it placed over the area of the callous.

Q. The hole is for ventilation purposes? A. No, the hole is actually to relieve pressure from the callous.

Q. Yes, I see. A. So, the thing acts like a doughnut; the hole in the doughnut is placed over the callous.

Q. That is to transfer pressure from the callous to another area? A. That is right.

Q. Yes, and these supports can be placed according to your diagnosis under any portion of the sole? A. Well, yes, that is right.

Trial Examiner Haycraft: What do you mean by 'portion of the sole'? Do you mean the sole of the shoe or the sole of the foot?

Mr. Maury: Sole of the foot, I meant.

By Mr. Maury:

Q. I think you understood that? A. Yes, I would like to qualify that a little.

Q. Yes. A. I have never had occasion to place the pads of the felt type on the medial side of the foot; I have used the rubber support.

Q. Which is the medial side? A. The inside portion."

[II R. 135, line 4, to 140, line 6]:

"Q. Whereabouts, in ordinary lay language, is that located in the foot? A. In the region of the cuneiform bones in the midtarsal region of the foot, that is the area before—below the ankle foot and in front of the toes directly across the top of the foot.

Q. That is what we usually indicate as the instep, isn't it? A. Yes.

Q. What bones is that composed of? A. The heads of the metatarsals, of the toes, the first and the fifth; the first, second and third cuneiform and the cuboid bone and the front end of the oscalcis may enter into it, although most people say it does not.

Q. It is rather a complex arch, is it not, Doctor? A. Yes.

Q. And which bone in that arch is the lowest one in point of closeness to the surface when the foot is flat? A. The cuboid and the heads, or I mean the base of the fifth metatarsal, which are contiguous.

Q. Yes, they are right together on the outside of the foot? A. Yes.

Trial Examiner Haycraft: You say the base?

The Witness: The base of the fifth metatarsal and the cuboid are on the bottom of that group of bones.

By Mr. Maury:

Q. Now, what bones compose this outer arch, that is, the arch on the outside of the foot? A. The fifth metatarsal, perhaps part of the fourth metatarsal, but the fifth metatarsal, certainly, the cuboid and the oscalcis.

Q. Now, is it true that the forces of thrust as the weight is taken off the foot in stepping, will concentrate upon the cuboid bone in both of these arches? A. No, I don't think so.

Q. You don't think so. Where does it concentrate as the weight moves from the heel to the metatarsal? A. Well, I don't believe it concentrates at any point in the manner that you have indicated. The weight is first borne on the heel.

Q. Yes. A. There is a good bit of the weight borne on the lateral side of the foot and then on the ends of the toes as the foot comes forward in walking. In standing, it is a different matter.

Q. Yes. A. However, when one says 'arch' one thinks of a Roman arch with a keystone in it, and that is not true of the foot at all.

Q. Will you explain, please the difference? A. Gladly. A Roman arch has a keystone, it is an architectural type of arch, and it means that when the keystone is placed in the arch it holds all the rest of the arch in position and the greater the amount of the weight that it put on it the harder that arch will hold until you reach the point that the stone will actually crush from the weight; and that is why some of the Roman buildings, many of them, are still standing today.

Q. That is a completely static piece of architecture? A. Well, I think—I am not an architect, but once it is set up, unless you knock the supports from under it, it is likely to be there a good while.

Q. Yes. A. Now, the foot arches are supported by ligaments and muscular structure, unfortunately, and that is why so many people have trouble with them, and it isn't a question of pushing the weight on one or another end of a keystone type of arch and having all of the stress concentrated at one point.

Q. That is a dynamic situation as compared to static? A. Yes.

Q. In other words, the foot is designed and built by nature for walking? A. That is right.

Q. Whereas the arch in architecture is designed to hold up an edifice? A. That is right.

Q. And that is the fundamental difference that you are trying to elucidate for me? A. Yes.

Q. And the arch of the foot, I take it, is more like a bow and arrow; is that right? That is, there are stresses and strains as in a bow and arrow which I use for illustration, and it is a very complex structure, is it not? A. That is right.

Q. And one in which are found many interwoven forces, stresses and strains; is that not true? A. That is true.

Q. Now, Doctor, what is the general effect of high heels? A. Well, one of the most common things is that a girl who from her youth has worn high heels by habit and who very seldom has worn anything else, she will have actual tightening and shortening of the calf muscles or the back of the leg, so that the time comes when she can no longer wear low heels or walk barefooted.

Q. That is, without strengthening of the muscles? A. Well, when any such strengthening is indicated, it is better to fit her with a moderately high heel and let her just take the shortening that she has rather than put her through surgical procedure.

Q. Now, that is the effect on the leg; what is the effect on the foot? A. Very frequently one will find that the muscles of the bottom of the foot have been considerably damaged by this prolonged high-heeled position.

Q. What is the effect upon the area of the metatarsal head or the ball of the foot? A. Well, the ball of the foot—sometimes there will be callous formations, although I don't believe the majority of the women that, day in and day out—and most of them, a great preponderance, have an inswing of their toes, the big toe and the little toe, and frequently an overlapping of one of the middle toes, usually the second, caused by the high heels, making them slide up and down in the shoes.

Q. Do you ever utilize foot pads or sole supports in the area of the shoe for that type of trouble? A. We sometimes do, yes.

Q. And where do you apply them? A. Well, I generally apply *them just behind the metatarsal region;* but for them to be effective it is necessary to put as low a shoe as possible on the woman; in other words, we get a pair of shoes with relatively low heel, usually not higher than an inch and a half, in order for the pad to be effective. If we try to put such a pad in high heel shoes, there will simply be a slipping forward away from the pad, which will have no effect. (Italics ours.)

Q. That is, you will have to lower the angle at which the shoe presses on the sole of the foot? A. Yes."

[II R. 142, line 22, to 143, line 23]:

"Q. Now, is it true, Doctor, that the arches of the foot were designed to be strongly supported at every step by this ground situation you have discussed? A. No.

Q. It is not? A. No.

Q. They are supposed to give and take and be molded to the surface as it exists in nature, as the step is taken? A. As the step is taken, as the foot

is designed it is molded by the surface that it meets and adapts to it as it goes to the next step.

Q. Now, would you say that a flat surface is best for the foot? A. Generally speaking, yes, more or less; I can't say yes or no on that; I can qualify it.

Q. Well, is a flat surface good for the foot? A. Not necessarily, no.

Q. What do you mean? Will you qualify it or give an explanation? A. Well, there is considerable difference, for example, in standing on wooden floors and on concrete floors. Very frequently if a man is working, standing on a concrete floor, in order to prevent shock, he will get himself a piece of rubber or a board to stand on.

Q. That is, rubber gives a little more, doesn't it? A. Yes, it does."

D. The Therapeutic Claims.

Six witnesses appeared for the Petitioner who had had *personal experience in using the device*: (1) Miss Ruth Kerr [II R. 156-205] was a specialist in the shoe industry, a consultant for Good Housekeeping Magazine, an adviser on leather shoes, and had made a special study of the device to determine whether it had merit as claimed.

It is remarkable indeed that after this special study, she became an emphatically enthusiastic user of the device herself; and after giving her opinion testimony, also gave her experiential testimony. At II R. 80, she states, "It made me feel more comfortable and more poised"; "The balance of the body was adjusted better, and the balance of the foot itself was improved." She could do a great deal of walking with much more ease than before she

wore the appliances, and in all respects her experience bore out the advertising claims.

(2) *Dr. Cassius E. Paul* [III R. 593, *et seq.*]; and (3) *Dr. John W. Wilson* [III R. 505, *et seq.*] were both members of the dental profession, forced to stand upon their feet for long working hours of the day. Both of them testified to the value of Burns Cuboids to them in their work and to the elimination of aches and pains and to the relief of their tired and aching feet.

(4) *Warren E. Woody* [IV R. 640, *et seq.*] and (5) *Harry L. Hanson* [IV R. 629, *et seq.*] had had similar experiences.

(6) *Dr. Garner* [III R. 558, *et seq.*] had found displacement relief from the pain caused to his leg by his foot, and as such, in this respect, was an experiential witness also.

In this connection, it is notable indeed that *no single member of the consuming public was produced by the Commission who had any complaint whatsoever to make concerning Burns Cuboids. Not one person came forward to say that he was dissatisfied with the device. No complaining witness ever appeared.* No irate patient of either of the Arlington doctors ever corroborated these worthies!

Instead, the complaint is based entirely upon the allegation by the Commission that "the Commission has reason to believe" that the law is being violated [I R. 2]. Out of a million customers [II R. 301], nobody (except

the Federal Trade Commission) from the record, "had reason to believe" that we have said anything false.

As "therapeutic" claims, the proscribed advertisements are certainly innocuous in the extreme! These claims are: that Cuboids *relieve strain and fatigue* [I R. 17]; that better poise and balance replace *aches and pains;* they drive away *foot fatigue;* they are the modern way to *foot relief;* they . . . *lessen fatigue;* they afford effective *relief to aching feet.*

These are the "therapeutic" claims proscribed by the order of the Commission [I R. 184-185].

Yet the Commission also [I R. 182-183] *found* as follows:

> "(b) The Complaint also charges that respondents have represented that the use of Cuboids will afford relief to strained, tired feet and alleges in such connection that the respondents' device possesses no therapeutic value as an aid to strained, tired feet. The greater weight of the evidence adduced in this proceeding does not support the conclusion that respondents' device possesses no value as an aid to strained, tired feet and the Commission is, accordingly, of the view that the charges relating to this issue of the proceeding should be dismissed."

And [I R. 180] the Commission also finds that

> "respondents' device is not an effective treatment for ordinary foot aches and pains and has no therapeutic value in the treatment of aching or painful feet."

Quære: With all due respect to an agency of the United States, is this a mere play upon words? Just where do "strained, tired feet" end as a condition and "ordinary foot aches and pains" begin? Is it not common knowledge that when one's feet are strained and tired, one will have ordinary foot aches and pains? Therefore, is not the Commission again inconsistent in its findings?

Again, with all due respect to the Federal Trade Commission, and with apologies to this court for the use of an expression purely of the vernacular, is this anything but "double talk"?

Too, we urge, the Federal Trade Commission has forgotten the maxim: *"De minimus non curat lex"—the law disregards trifles.*

Compare, for example, the advertising claims made in the case of *Irwin v. Federal Trade Commission,* 143 F. 2d 316. The device therein discussed was entitled a "detoxifier." It was, in essence, not much more than a device to administer enemas. The advertising claims therein were as follows:

> "This natural and drugless therapy performs as follows:
>
> " '1. Cleanses both large and small bowel, thoroughly and in a harmless manner.
>
> " '2. Massages the bowel and gives necessary tone to tissues involved.
>
> " '3. Its employment of oxygen destroys the anaerobic germs, which can not live in this medium.

" '4. Purifies the blood stream; proved by miscroscopic examination after treatments.

* * * * * * * *

" '6. Reduces hypertension or high blood pressure, thus easing the work of the heart and freeing the walls of its cells, and the brain, from undue strain.

" '7. Indicates to patients what foods to avoid to insure maximum efficiency in digestion.

" '8. Lessens the burden thrown on the liver and kidneys.

" '9. Improves sinus—and antrum complications in a few treatments.

" '10. Re-establishes a normal persistalsis, or natural muscular activity of the intestines.

* * * * * * * *

" '12. Assists in preventing the hardening of the arteries, by minimizing the deposits of calcium and magnesium salts on the walls.'

"A pulsating stream of water and air bubbles is introduced into the bowels in a scientifically controlled manner. This pulsating stream penetrates readily into the small intestine, hitherto inaccessible to any other method of treatment. Most ailments are found to originate in the small intestine.

"Ozone is especially beneficial in cases of ulcers, colitis, bowel inflammation and toxemia.

"Ozone destroys bacteria on contact yet it is not a drug and is non-toxic and non-irritating. It promotes healing and stimulates."

"Specializing in Cases of
Intestinal Toxemia.
The Cause of Most Human Illness.

"The following symptoms and ailments are almost invariably caused by Intestinal Toxemia. They can now be successfully treated.

Appendicitis
* * *
Asthma
Colitis
Constipation
Excessive Fatigue
Foul Breath
Headache
Gall Bladder Complications
High and Low Blood Pressure
Indigestion
Irregular Heart
Kidney and Bladder Complications
Liver Complications
Lumbago
Menopause Disturbances
Muddy or Pimply Complexion
[Migrain]
Nervousness
Pruritis ani
Rheumatism
Sinus Trouble
Run Down Condition
Short of Breath
Sleeplessness
Ulcers of Stomach and Bowels
Ulcerative Colitis."

It was, we submit, this type of therapeutic claim that the law was designed to prohibit. An attack, such as

in this case, by the great and powerful Federal Trade Commission upon a small, legitimate, upright manufacturer, with its attendant expense, uncertainty, and worry, over something so close to the truth (conceding for arguments sake, without admitting, the Federal Trade Commission's position) that the Commission itself cannot make a definitive distinction without confusion and inconsistencies in its own findings, has, we submit, taken the whole process far, far afield from its original design and purpose!

We respectfully submit that the Commission's findings are again not only lacking in substantial evidence as to "therapeutic" claims but that actually the findings are completely unfounded upon *any* evidence.

E. Callouses.

The Commission found: "Cuboids will not be generally effective in treating or relieving calloused conditions" [I R. 180]. The Commission ordered the Petitioner to cease and desist when advertising "that said device possesses therapeutic value in the treatment of calloused feet."

In these matters the Commission differed from *all* of the experts. Dr. Engh testified [II R. 51] with respect to the metatarsal bar which is incorporated into the Cuboid:

> "Q. That does not explain to me how this pad under the metatarsal head will relieve the pain there. I would like to know that. A. It relieves pain by taking pressure away.
>
> Q. Taking pressure off the head? A. That is right.

Q. And transferring to some other portion of the foot? A. That is right.

Q. And that relieves the pain? A. That is right.

Q. Now, the pressure, of course, that produces the pain is registered in the brain by the nervous system, isn't it? A. Yes.

Q. And it is the pressure on the nerve ends that is relieved. A. Yes."

Dr. Masterson testified [II R. 68-69]:

"Q. In your opinion, Doctor, what sort of foot trouble, if any, would be benefited by wearing the Cuboids? A. Well, there might be an occasional case with a small metatarsal elevation and elevations in the cuboid and scaphoid area where, through a happy circumstance, that happened to be an exact fit, where with a mild metatarsal depression in the region of the third metatarsal head, it could help.

Q. What extent would that help be? A. Well, if it happened to fit right, it may give the patient a fair amount of relief.

Q. By easing the pressure? A. By easing the pressure."

And at II R. 82-83, we find the following:

"Q. Where are callouses, generally? A. Generally in the metatarsal area.

Q. Metatarsal area? A. Metatarsal area; that is right.

Q. In the area where you are bearing weight? A. Where you are bearing weight, yes.

Dr. Mosiman [II R. 131-133] testified that the genesis of callouses is due to friction; that they are largely on the metatarsal area of the foot; that a support is needed

to relieve pressure from the area of callouses. Sometimes these are made of rubber or cork or a felt pad placed so that it will relieve pressure from the callouses, and transfer pressure from the callouses to other areas.

At pages 139-140 it appears that Dr. Mosiman applies foot pads just behind the metatarsal region.

Dr. Hiss [II R. 246-247; II R. 264] states that the forepart of the Cuboid is nothing but a modified Thomas Bar which, by being placed just back of the callouses or the weight bearing part of the ball of the foot, will assume some part of the weight by pressing up on the foot and relieving some of the weight on the ball of the feet. That is what happens when you use a metatarsal pad, a Thomas Bar, or any kind of a bar that will assume some of the weight and take it off of the callous.

Dr. Garner gave out the same idea [III R. 567], and Dr. Lewin was most explicit in his description of the device [IV R. 847-848] in which he describes a "Jones Bar" as a strip of metal on the bottom of the shoe sometimes attached to or incorporated in the sole of the shoe —a straight object that goes behind the first and fifth metatarsal bones, that is, the heads of them.

Dr. Lewin at IV R. 936-939 explains what he designates as a "Lewin Rubber Metatarsal Crescent." This is a curved object to correct a curved structure or to support a curved structure as illustrated in Respondent's Exhibit 29 in Evidence. It is a modification of the shoe; its purpose is to relieve people of weight bearing on certain areas, to give them some degree of comfort, and to balance their feet more properly.

He discusses the Commission's Exhibit 3 in Evidence, the forward section thereof, and states that this is similar

to the Lewin Rubber Metatarsal Crescent. This raises the metatarsal area slightly, and the purpose is to transmit the weight from the heel to "an area back of the metatarsal heads and relieve those heads of pressure." It is a weight bearing point so that the person transmits his weight from the heel to an area just back of the metatarsal heads, instead of having the weight come down on the metatarsal heads.

It is to relieve pressure or weight on the metatarsal heads; it takes weight off the metatarsal heads; it might and should help callouses on the metatarsal arch area. The Lewin Crescent is a very frequent prescription, and Dr. Lewin always sends these *to the shoemaker to have them executed.*

At IV R. 940, it appears that the object is to give the person relief from foot pains, foot discomfort, to aid balance, to improve stance, to take weight bearing off the sensitive parts of the feet, and to transfer it to other parts of the feet. All this, according to Dr. Lewin, tends to relieve callouses.

Since there is no word to the contrary in the entire transcript, we submit that the above mentioned finding and the order are without foundation of substantial or *any evidence.*

F. Dr. Lewin, in Fact, Might Easily Have Been the Inventor of the Device.

While he was a witness hostile to the Petitioner, nevertheless Dr. Lewin, from his own testimony and methods, might easily have been the inventor of the Cuboid.

The Cuboid [Com. Ex. 3, Pet. Ex. 1] has as its distinguishing features:

1. A crescent-shaped elevation across the front, which fits just behind the metatarsal heads, and takes the pressure off these heads. [See Ex. 33-B, Dr. Lewin's diagram.]

2. Wedge-shaped elevations along the sides at the point of the heel [see Exs. 29, 1, 2, 3, 5, 7, 9, Dr. Lewin's illustrations; Ex. 3, Dr. Lewin's method].

3. 200 different varieties of combinations of these elements.

Dr. Lewin explains his devices as follows [IV R. 937]:

"By Mr. Maury:

Q. Calling your attention to this page, the diagrams demonstrate types of bars and pads? A. No, modification of shoes.

Q. Modification of shoes? A. Yes.

Q. What is the general purpose of these modifications of shoes? A. To relieve people of weight bearing on certain areas, to give them some degree of comfort, and to balance their feet more properly.

Q. You have found throughout your experience that these devices are effective in that respect? A. Yes, sir.

Q. Calling your attention to Commission's Exhibit 3 in evidence, and to the forward section thereof, can you tell us whether there is any similarity between that and the Lewin rubber metatarsal crescent illustrated in your book on page 103? A. Whether there is any similarity?

Q. Yes, sir. A. Between what?

Q. Between the Lewin rubber metatarsal crescent and the device now before you? A. This goes on the bottom of a shoe?

Q. It goes on the bottom of a shoe? A. Yes.

Q. But it does have the effect of raising that area slightly, does it not? A. That is right.

Q. And what would be the effect of— A. Wait a minute. You said it has the effect of raising it?

Q. Raising that area of the foot? A. Oh, it isn't for that purpose.

Q. What is the purpose of that? A. The purpose is to transmit the weight from the heel to an area back of the metatarsal heads and relieve those heads of pressure.

Q. I see. And it does that by elevating the area back of the metatarsals, does it not? A. I don't know that it elevates it. It is a weight-bearing point, so that the person transmits his weight from the heel to an area just back of the metatarsal heads, instead of having the weight come down on the metatarsal heads.

Q. I see. A. It is sometimes called an anterior heel, that the ordinary heel that the shoe comes with is the posterior heel, and this is an anterior heel over which the foot rocks, but so far as pushing up on anything, I don't know that that occurs. I tried to do it, but when it is attached to the shoe it is just another weight-bearing point.

Q. But it does transfer weight? A. From the heel to the forefoot.

Q. Does it transfer any weight from the metatarsal heads to the points back of them? A. No, it is to relieve pressure or weight on the metatarsal heads.

Q. Then it takes weight off the metatarsal heads? A. That is right.

Q. What effect would that have on callouses of the metatarsal arch area? A. It might help, it should help them.

Q. Have you used them for that purpose, Doctor? A. Yes.

Q. That is a very frequent prescription, is it not? A. Yes.

Q. You do prescribe these things for various persons? A. Individually.

Q. Individually? A. Always.

Q. *But you send them to the shoemaker to have them executed, do you not?* A. *That is right.*

Q. Is the same true of the other devices which you depict on that page, Doctor, that you prescribe them for various patients? A. I prescribe some of them. That was an illustration of the principal ones.

Q. Yes. A. I don't know that any one person uses all of those.

Q. Surely. But they may be used in combination, too, may they not? A. Yes.

Q. Depending on the person's foot? A. That is right.

Q. And the object is to give the person relief from foot pains? A. That is one of the purposes, to give them relief from discomfort.

Q. And to aid them in balance, is it not, Doctor? A. Yes.

Q. And to perhaps improve his stance? A. Yes.

Q. Also to take weight-bearing off of sensitive parts of the feet? A. Yes.

Q. And to transfer it to other parts of the feet? A. Yes, sir."

Thus, by a comparison of the Cuboid with the devices used by Dr. Lewin, it is inescapable that, in essence, the Burns Cuboid [Pet. Ex. 1] is comprised of what Dr. Lewin describes as the "Lewin Metatarsal Crescent,"

together with side heel wedges [also as prescribed by Dr. Lewin—See Exs. 29, 30, 31, 32, 33]. It is a combination of the separate devices described by Dr. Lewin. Hence, Dr. Lewin might easily have been the inventor of the Burns Cuboid from the identical devices which he uses.

G. The Commission Itself Found From the Testimony of Their Own Witness That the Device Balances the Foot, and the Commission's Own Findings so State.

Much has been said in this case concerning the use of the word "balance" in the advertising. Foot balance has been discussed. Body balance has been discussed. And the Federal Trade Commission has ordered that the word balance and all references thereto be excised from our advertising [I R. 184].

Webster gives as synonyms of "balance," the words "equilibrium," "poise," "equipoise," and "counterpoise," when applying the word to weights, etc.

The experts in this case *all* agreed in essence that the balancing of the body is the maintenance of good equilibrium through neuro-muscular control of the muscles, bones and other structures of the body on the foot, etc.; that foot balance is the balancing of the foot upon its sole and its heel, and that body balancing is the balancing of the entire body up from the foot and includes the feet and legs [II R. 41-42, Dr. Engh; I R. 89-90, Dr. Masterson].

At II R. 222-223, Dr. Hiss described it as follows:

> "A. I want to talk about locomotion before I do that. I have described stance as balancing one's weight. Walking is balancing one's weight alternately on one foot and then on the other, and there

is also weight distribution as I do that, which I will discuss later.

"Now, as I step forward, the actual part of locomotion is in the calf of the leg, that is the transverse suree, that is the big calf muscle. That is the engine which locomotes forward, so those muscles are pulling forward and pushing me off the ball of the foot as I go, but in order to keep the balance there is a muscle on either side, on the outside the peronei muscles which are in the calf of the leg, and the tibiales on the inner side. They are eternally working against each other to keep this balance. They are eternally working and they are the ones that are working on this bad foot. Really the bad foot is the one that you would have a lot of consideration, because that is the one you put the Burns cuboid on or any other kind of appliance to try to give people relief.

"That is locomotion. The engines are working in the calf of the leg in the center, and to the outside are the peronei muscles which are keeping me from going over this way, and the tibiales in the inner side of the foot keeping me from going over this way, so that they are eternally attempting to keep your balance on the outside as we walk.

"Now, that is foot function."

Dr. Garner also defined and explained "balance" [III R. 535-538], as follows:

"Beyond the shadow of any doubt, the foot is the foundation of the body. We can have nothing as a matter of physics, no structure of any kind, without a foundation. The human body is no exception. If you are going to have it upright, you have to have a foundation.

The feet are its foundations. The body is a heavy, corporal organism, and very complicated in structure. The erect posture which man has assumed and maintains demands that he have a constant fight against gravity, because gravity is tending continuously to pull him down to the ground. That means that in some way he must be able to balance the body so that he can overcome this pull of gravity. The less the effort that is required on his part to maintain this balance, of course, the more it is to his benefit, and the more effort he has to exert to maintain it, the more detrimental to him.

Now, that being the case, the foot plays an important part, because if it tilts to one side or the other, if the arches are weak or give way and let the foot down, it changes the way and the direction in which the weight of the body is carried toward the foot.

The weight of the body, first, considering the upper body, is carried down to the large pelvic bones that we are all familiar with around the hips. From there it is carried to the large femur, the head of the upper thigh, or throughout the thigh, and down to the two bones in the leg, and then from that is transmitted to the astragalus.

The line along which that is exerted is down the front of the thigh and across the front of the knee, across the front of the leg, down across what we call the dorsum or the upper part of the foot, and would run out at a point about at the second toe, between the two toes, but closer to the second toe. That is a line that has been worked out by physicists and anatomists as being the line along which the body's weight is transmitted toward the foot.

Of course, it has to split when it strikes the os calcis to be transmitted to the ground. But if this

foot is allowed in any way to alter its normal position, whether by accident or by long continued use or weakness or whatnot, then that is going to change that line of weight bearing and change its way of transmitting toward the foot and ultimately to the ground.

Q. Will you describe the effect any disturbance of that tripod you have described will have upon the body balance? A. Well, I beg your pardon. I didn't describe the tripod. I didn't go that far.

Q. I beg your pardon. I thought you said the weight bearing was at the front and at the rear. A. No, I stopped there. I didn't know you wanted me to go that far. I spoke of the change in the weight bearing.

Q. I was thinking of the line you drew through the toes and out through the heel. A. No, I just mentioned the line that scientists have described as being the line along which weight is exerted down the front of the foot, across the middle of the leg this way, but I said nothing about the back. I better go into that.

Q. Please do. A. When the weight of the body is transmitted, largely through both the tibia and the fibula, but mostly through the tibia, when it is transmitted through the tibia here—

Q. Indicating the top of the— A. The top of the astragalus where the two meet—the bone—the weight divides. When a person, if you are standing on both feet—now, of course, the foot is not a fixed problem. We move, we walk, we dance, we climb hills, we go upstairs and come down, so it is constantly in motion, but if we are standing on both feet with the body erect in the what we call normal posture of man, one-half of the body weight would be

transmitted to each foot. That is just a question of reason, as far as that goes.

Now, when that strikes the top or articular surface of the astragalus, it goes to that bone and there divides into three special lines, one going back to the tuberosity os calcis on which the heel bone rests, another going to the base of the little toe—not the base, the head, just behind the head of the little toe—and the other one to just behind the head of the first big toe or the first metatarsal bone.

That creates a triangular way in which the weight is ultimately carried to the ground. The arch holds it up and the head of your tripod, as you might call it, would be here (indicating).

Then the three points of contact would be underneath the heel, underneath the head of the first metatarsal and underneath the head of the first and fifth metatarsals. The estimate is that half of the weight of the body—that is, half of which goes to each foot—I stated a while ago that when standing, half of the body weight is on each foot. Then, half of that goes to the os calcis. The other half is distributed between the two ends of the transverse or metatarsal arch, just behind the head of the first and fifth metatarsal bones.

The other metatarsal bones take in a certain amount of that distribution of weight, too, but they usually transmit that back more or less from one side to the other. They don't become perfectly flat. It still retains an arch across there and is transmitted, still retaining the tripod."

Dr. Lewin [IV R. 830-831] discussed "balance" as follows:

"Q. What is your opinion as to whether or not most of the body weight thrust from the tibia of

the leg is received and distributed by the inner or medial longitudinal foot bone, both in a standing position and during locomotion? A. I believe most of it is transmitted through the medial group of the bones just enumerated.

Q. In stance, that is the standing position, what is the distribution of body weight in the foot? A. I think it is variable, depending on which position the person is standing in.

Q. Will you explain to us how you arrive at that answer? A. Would you care to have me demonstrate?

Q. Yes. A. If a person stands in this position, the heels together and the toes apart, all of it is on the inner body. If he stands in a square position, straight ahead, where the heels and the toes are the same distance apart, you will note that the weight is on this side. Is that an answer to your question? However, that is variable, because no two people stand or walk alike.

Q. Where would it be distributed on the last? A. Along the inner body.

Q. With their feet out? A. That is right, and their heels together and their toes outward.

Q. Doctor, will you tell us, if you will, how much weight is borne by the first metatarsal in comparison with each of the other metatarsal bones in stance? A. Probably twice as much.

Q. Of the total weight borne by the five metatarsal bones, what proportion or percentage thereof is borne by the three medial metatarsal bones? A. I would say more than half.

Q. What part of the metatarsal bone actually bears the weight? A. The head takes the weight but there is a strain on the shaft. They meet the shoe and they meet the ground."

The device, as the Court will observe, after being worn [see Pet. Ex. 1 in Evid.; II R. 100], shapes itself to the wearer's heel. From observation of this Exhibit, it can be *seen* that on the outer edges of both sides and at the heel, there is a wedge-like elevation all the way around the sides of the heel, and the resulting surface for the heel to rest upon is concave, rather than flat. The contention of the Petitioner throughout is that, since the calcaneus is a rounded bone [Resp. Ex. 10], the wedges at the side tend to and do assist the wearer in attaining balance. During the course of the trial [II R. 49-50], counsel for the Petitioner produced a rounded glass paper weight [II R. 48-50], and balanced it on its rounded surface. Dr. Engh (for the Commission) conceded that since it was rounded, it had a tendency to roll easily. He also conceded that if a couple of rubber erasers were inserted under the edges, it did not roll so easily, and a more stable equilibrium was produced.

The same fact was volunteered by Dr. Masterson [II R. 83-84], as follows:

> "Q. Now, Doctor, I will draw your attention to the elevation in this Commission Exhibit 3 here (indicating), the one beneath the cuboid bone, when pressure is put on that; do you understand that that falls into a depressed or concave pattern? A. Yes.
>
> Q. And what effect does pressure upon the cuboid bone have— A. I wouldn't say it had any.
>
> Q. Wouldn't you support that area slightly? A. What for?
>
> Q. I didn't ask you what for; I said does it or does it not tend to support that area underneath the cuboid and the anterior end of the fifth metatarsal?
>
> A. *It is practically balanced by your support on the other side.* (Emphasis ours.)

Q. The support given by the cuboid? A. No. You have got one on each side, so that they almost negate themselves.

Q. How do you mean, 'negate themselves'? A. Well, I mean if you put a one-inch lift on one side and a one-inch lift on the other side and put them together, you still have not raised them, or very little, if you are trying to elevate one side or another.

Q. I don't think you are answering my question. Doesn't it support— A. I don't feel that it does.

Q. You do not feel that it supports to the benefit of the cuboid and the fifth metatarsal? A. I don't feel that it does.

Q. What does it support? A. It doesn't support anything.

Q. It is underneath the foot? A. It is underneath the foot.

Q. And you say it does not support it? A. I don't feel it does.

Q. But the foot rests on it? A. The foot does rest on it.

Q. And if it did not support— A. But it also rests on the other lift that you have on the other side.

Q. Well, isn't that supported? A. *The two balance each other,* and I feel that they don't support." (Emphasis ours.)

At this juncture the doctor was discussing the wedges on the sides of the heel area of the Cuboid in evidence.

Whoever wrote the Commission's findings of fact did not sufficiently analyze the situation to note the inconsistency occasioned by the finding that the device does

not assist in balancing the foot [I R. 191] and by accepting Dr. Masterson's testimony above [I R. 178]. The Commission in one breath finds [I R. 178]: "The circumstance that both sides of the device are raised and there is a tendency for these lateral elevations to balance one another out," and in the next, 3 pages later [I R. 181]: "Cuboids will not assist in balancing the foot . . ." The first finding is not quite an accurate quotation or interpretation because the doctor said, "The two balance each other, and I feel that they do not support" [II R. 83-84], whereas the writer of the findings said that "There is the tendency for these lateral elevations *to balance one another out.*"

Since these side elevations do not touch each other and actually have no relation to each other except as they affect that which they both touch, namely, the human foot, therefore the only possible way they could "balance one another out" would be to balance the foot. In other words in and of themselves and with no foot resting on them, these lateral elevations could have *no balancing action whatsoever.*

So, how, indeed, can the propriety of the finding be sustained in the light of the language used, *i. e.,* when the Commission's witness and the Federal Trade Commission itself both say that these heel wedges do in fact balance the foot?

It is the same kind of balance as that effected by the two rubber wedges under the sides of the rounded glass paper weight. Balance is a stable equilibrium. The fact was so obvious that the Trial Examiner and the Commission, both lost in the maze of words, failed to see the woods for the trees!

The advertising claims concerning balance are that:

Cuboids help to balance your body weight;

They are "foot balancers";

They afford foot balance;

They . . . "combine scientific principles of balance and support . . ."

"Now every one can enjoy better posture, poise and balance . . . with Cuboids";

"Cuboid foot balancers . . ."

"The feet are the body's foundation. Cuboids help balance this foundation . . ."

"Cuboid metal-free foot balancers . . ." [I R. 4-5.]

Dr. Mosiman observes [II R. 91-92]:

"Q. And is the adaptation to your foot an advantage to your foot? A. Yes, I think it is."

And that the Cuboid adapts to the curvature of the heel [II R. 94]:

"Q. Would you say that that [Pet. Ex. I] has been adapted by wear to the foot of the wearer? A. I would say that is [it] has been adapted to the curvature of the heel."

And [II R. 95]:

"Q. And the fact that it has been worn causes this differential in surface contour? A. I think that is a correct assumption."

See also, II R. 97: If shoes fit, the wearer has better balance. (Dr. Masterson.)

In conclusion on this point, we submit that the truth of our advertising is so patent that even the Commission itself found:

> ". . . There is the tendency for these lateral elevations to balance one another out." [I R. 178.]

That is what we mean by balance—a surface on which the foot walks, which is molded to the foot, has side elevations, which support both sides of the foot, *i. e.,* a more stable equilibrium caused by the contour of the cuboid when walked on.

H. Applicable Law.

(i) The False Advertising.

The law upon the subject of false advertising seems well settled:

The purpose of the law is for the protection of the public against the obvious evils which attend upon falsity in advertising of medicines or devices. An able exposition is found in the case of *Charles of the Ritz v. Federal Trade Commission,* 143 F. 2d 676:

> "The law was not 'made for the protection of experts, but for the public—that vast multitude which includes the ignorant, the unthinking and the credulous' *Florence Mfg. Co. v. J. C. Dowd & Co.,* 178 F. 73, 75, and the 'fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced.' *F. T. C. v. Standard Education Soc.,* 302 U. S. 112, 116, 58 S. Ct. 113, 115, 82 L. Ed. 141. See also, *Stanley Laboratories, Inc. v. F. T. C.* (9 Cir.), 138 F. 2d 388, 392, 393; *Aronberg v. F. T. C.* (7 Cir.), 132 F. 2d 165, 167; *D. D. D. Corp. v. F. T. C.* (7 Cir.), 125 F. 2d

679, 682. The important criterion is the net impression which the advertisement is likely to make upon the general public." (Citing cases.)

In *Moretrench Corp. v. Federal Trade Commission,* 127 F. 2d 792, 795, the court says that the Commission may "insist upon the most literal truthfulness" on the part of the advertiser.

The case of *General Motors Corp. v. Federal Trade Commission,* 114 F. 2d 33, 36; cert. den. 312 U. S. 682, 61 S. Ct. 550, 85 L. Ed. 1120, ascends to the realm of Biblical dissertation and quotation and asserts as a matter of law that the Federal Trade Commission

> "has the discretion to insist if it chooses 'upon a form of advertising clear enough so that in the words of the Prophet Isiah, "wayfaring men, though fools, shall not err therein."' "

In the case of *Aronberg v. Federal Trade Commission,* 132 F. 2d 165 (7 Cir.), it is held that the advertising therein contained was properly determined by the Commission to be false because of a definite innuendo which was therein contained. In discussing the matter, the court stated as follows (pp. 169-170):

> "Physicians, experts in gynecology and obstetrics, testified as to the qualities and effects of the preparation. They generally agreed that taking them in small quantities or for a short period would probably not cause a serious result, although the patient might experience discomfort. However, their evidence is that if the medicines are taken for a period of from four to ten days as prescribed, danger of a severe abnormal circulatory condition due to construction of blood vessels will arise, resulting in severe gastro-intestinal disturbances and violent poisonous effects up-

on the human organic system. In some instances, where women particularly are susceptible to or are suffering from certain diseases, such results will appear more quickly and will be fraught with greater danger. In pregnancy, harmful results will be more probable and, when occurring, were pronounced. Use of such preparations may cause abortion An overdose of from six to twelve pills in a day may produce dangerous results within a day or two, while taking the pills as prescribed for a period of from two to three weeks is likely not only to produce the mentioned dangerous results, but also to lead to a gangrenous condition of serious nature. The concensus of the expert testimony was that petitioner's preparations are not competent, safe, or reliable as a relief for delayed menstruation because of the heavy dosage of drugs contained in each capsule. There was also subsantial agreement among all the medical witnesses that in sound medical practice, doctors will prescribe emmenegogues only in exceptional cases, and then only after careful examination of the patient and under strict instruction and supervision.

"It is thus apparent that the Commission was justified in believing that where preparations such as petitioner's are sold indiscriminately to the public and taken without medical supervision, prescription or adequate warning as to probable effect, many users, because of ignorance, alarm or desire for quick relief, are likely to take excessive or too frequent doses, thus increasing the dangerous potentialities. Yet there is nothing to warn users against such contingencies. In fact, statements that the preparations are 'harmless,' 'non-habit forming,' 'pure vegetable ingredients' quite reasonably lead users to believe that not only are the capsules absolutely safe to use as suggested but safe to use in excess."

Certainly no such effects as are there described could, from all the evidence, even be remotely expected from any usage of Burns Cuboids, the device in question. It is not an internal device; it merely goes under the sole of the purchasers' foot inside his shoes. If he is dissatisfied, his feet will soon tell him, and he can take them back to the point of purchase and get his money back. The device is definitely not in that class of devices where there is any drug, or chemical compound, taken into the internal system of the purchaser.

In addition, it is definitely not such a device as can be said to have any inherent danger in it whatsoever if not "taken" under the auspices of a physician. The entire record contains not even a hint to the the contrary. The device is analogous to a crutch, not an arthodontic brace. The Commission should, of course, exercise the greatest of vigilance over the advertising of those therapeutic devices which contain inherent danger to the purchaser.

Here self medication is concerned. If I sprain my ankle, it does not take a doctor to tell me that I need a crutch. If there is an inherent sprain in my foot, and if by trying Burns Cuboids I gain relief, there is no need for a doctor to tell me to wear them. If, on the other hand, I do not gain relief, neither then do I need a doctor to tell me to take the device out of my shoe and go and get my money back.

It is in no sense in that category of devices which were the subject of investigation and discussion in connection with advertising in the case of *Irwin v. Federal Trade Commission,* 143 F. 2d 316.

The device therein discussed was entitled a "detoxifier," which we have discussed above.

There the Commission, we quite concur, was more than fully justified in taking action to stop such advertising. The court, in summing up the reasons for its sustaining the Order of the Commission, states as follows:

> "The existence of a public interest here rests on the deception practiced upon the public." (Citing *Federal Trade Commission v. Royal Milling Co.,* 288 U. S. 212, 53 S. Ct. 335, 77 L. Ed. 706, and *National Silver Co. v. F. T. C.* (2 Cir.), 88 F. 2d 425.)

It is selected by us as an example of what we point to as false advertising. We are not here trying the "detoxifier," but we wish to emphasize the distinction between that class of advertising and the advertising which is in evidence in the stipulation in this case as being in current use by the Petitioner.

No such quackery can be charged to our door. A similar situation involving the general policy of the United States, although not involving the Federal Trade Commission, is found in *United States v. 62 Packages of Marmola Prescription Tablets, Raladam Co., Intervenor,* 48 Fed. Supp. 878.

The article there involved was "Marmola Tablets" which contained, among other things, *dessicated thyroid,* a powerful drug. False and misleading labelling was charged. Marmola was advertised as being effective in reducing weight and contained quite an extensive set of directions for self medication in the labelling and pamphlets which went with the product. The court stated as follows (p. 887):

> "The Federal Food, Drug and Cosmetic Act was not made for experts, nor is it intended to prevent self-medication. The purpose of the law is to protect

the public, the vast multitude which includes the ignorant, the unthinking, and the credulous who, when making a purchase, do not stop to analyze. It was enacted to make *self-medication safer and more effective,* and to require that drugs moving in interstate commerce be properly labeled so that their use as prescribed *may not be dangerous to the health of the user.* It should receive a liberal construction. *United States v. Lee* (7 Cir.), 131 F. 2d 464; *Florence Mfg. Co. v. J. C. Dowd & Co.* (2 Cir.), 178 F. 73; *Aronberg v. Federal Trade Commission* (7 Cir.), 132 F. 2d 165. (Italics ours.)

"The administration of thyroid tablets in Marmola dosages is a dangerous procedure, and should not be undertaken without a thorough examination of the prospective user by a competent physician, and then only under the supervision of the doctor.

"The Court is thoroughly convinced, by a preponderance of the evidence that Marmola when used as prescribed in the labeling thereof, is neither a safe, appropriate, nor an efficient remedy for obesity; that it is dangerous to the health of the user when used in the dosage or with the frequency and duration prescribed, recommended or suggested in the labeling thereof; that the packages of Marmola in question, when seized in these proceedings, were misbranded within the meaning of the sections of the Federal Food, Drug and Cosmetic Act involved herein; that the labeling on Marmola is false and misleading in its representations that it is a safe remedy for obesity, and in that it fails to reveal facts material with respect to consequences which may result from the use of Marmola under the conditions prescribed in the labeling."

Our product in the first place, contains absolutely no danger whatsoever to the public, no matter what advertising accompanies it, so long as the obvious occurs and the purchaser puts it in his shoe. If by any chance the purchaser should be suffering from some systemic disease which conceivably might affect the bones of his feet, the insertion of a Burns Cuboid in his shoe *can in no wise affect that* disease. The Commission, having the burden of proof, has failed absolutely (although it tried), to prove that if some purchaser were suffering from a systemic disease, he might conceivably suffer from evil consequences from the device.

Our device could do no possible harm.

In *Federal Trade Commission v. Standard Education Society,* 302 U. S. 112, 116, 58 S. Ct. 113, 115, 82 L. Ed. 141, the court said:

> "The fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced. There is no duty resting upon a citizen to suspect the honesty of those with whom he transacts business. Laws are made to protect the trusting as well as the suspicious. The best element of business has long since decided that honesty should govern competitive enterprises, and that the rule of *caveat emptor* should not be relied upon to reward fraud and deception.
>
> "* * * To fail to prohibit such evil practices would be to elevate deception in business and give to it the standing and dignity of truth."

Thus we see that the question is not what effect the advertising will have upon the experts but upon the gen-

eral public as a whole and even as it is said in *Florence Mfg. Co. v. J. C. Dowd & Co.* (2 Cir.), 178 Fed. 73 at 75:

> "The law is not made for the protection of experts but for the public—that vast multitude which includes the ignorant, the unthinking and the credulous who, in making purchases, do not stop to analyze but are governed by appearance and general impressions."

See also:

Stanley Laboratories v. Federal Trade Commission (9 Cir.), 138 Fed. 388;

D. D. D. Corp. v. Federal Trade Commission (7 Cir.), 125 F. 2d 679;

Dorfman v. Federal Trade Commission (8 Cir.), 144 F. 2d 739;

A. P. W. Paper Co. v. Federal Trade Commission (2 Cir.), 149 F. 2d 424, aff'd 328 U. S. 193, 66 S. Ct. 932, 90 L. Ed. 1165;

Gulf Oil Corp. v. Federal Trade Commission (5 Cir.), 150 F. 2d 106;

Parker Pen Co. v. Federal Trade Commission (7 Cir.), 159 F. 2d 509;

Stork Restaurant v. Sahati (9 Cir.), 166 F. 2d 348.

A recent statement on this point is contained in *P. Lorillard Co. v. Federal Trade Commission,* 186 F. 2d 52 at 58, as follows:

> "In determining whether or not advertising is false or misleading within the meaning of the statute, regard must be had, not to fine spun distinctions and argument that may be made in excuse, but *to the effect which it might reasonably be expected to have upon the general public.* The important criterion is the net impression which the advertisement is likely

to make upon the general populace.' *Charles of the Ritz Dist. Corp. v. Federal Trade Comm.,* 2 Cir., 143 F. 2d 676, 679-680. As was well said by Judge Coxe in *Florence Manufacturing Co. v. J. C. Dowd & Co.,* 2 Cir., 178 F. 73, 75, with reference to the law relating to trademarks:

" 'The law is not made for the protection of experts, but for the public—that vast multitude which includes the ignorant, the unthinking and the credulous who in making purchases, do not stop to analyze, but are governed by appearances and general impressions.' See also *Federal Trade Comm. v. Standard Education Soc.,* 302 U. S. 112, 58 S. Ct. 113, 82 L. Ed. 141; *Stanley Laboratories v. F. T. C.,* 9 Cir., 138 F. 2d 388; *Aronberg v. F. T. C.,* 7 Cir., 132 F. 2d 165; *Ford Motor Co. v. F. T. C.,* 6 Cir., 120 F. 2d 175."

What, then, is the effect of the word "balance" upon the mind of the general public? Also foot balance; body balance?

The technical expalanations from the experts in this case concerning the meaning of foot and body balance, while very interesting, while educational, and while serving basically to give an understanding, a concept of foot balance, are all of very little aid if they differ in meaning and context from the impression which the advertising involved makes upon the public.

Just what is the impression upon the pubic mind of the following advertising claims?

"Cuboids help to balance your body weight."

The device is named after the Cuboid bone, but to the ordinary lay reader, the word "Cuboid" contains no connotative meaning whatsoever with reference to the human

foot or its parts. Thus, the lay reader, upon reading the foregoing, will be led to associate the word "Cuboid" with the shoe insert, and he will next be led to the idea, the concept, that this device helps to balance his body weight. He can see that it is a device to be fitted into a shoe. He knows instinctively that he walks upon his feet and he immediately gets the idea that the device is intended to help him balance himself as he walks or stands upon his feet, and that the claim is that the device will do so.

He (being one of those utterly ignorant members of the public mentioned by the courts) has no concept of the nervous tension or the concatination of neuro-muscular forces necessary to accomplish balance, and thus receives the mere and simple impression that Cuboids help him to balance his body on his feet.

The connotative meaning induced, the impression upon the lay public, the meaning—under the cases—of the advertising, thus, is that the product will help to balance body weight on the foot—in the lay sense. That lay sense means, in essence, that it makes walking and standing easier and more comfortable for the purchaser to accomplish; also that it lessens fatigue to wear Cuboids and thereby posture and poise are improved; too, that the side heel wedges "balance each other out."

(ii) Secondary Meaning.

The word "Cuboid" is here a trade name. It has acquired [or is acquiring] a secondary meaning. Secondary meaning is discussed in the *Elgin Watch* case, 179 U. S. 665, 45 L. Ed. 365, 21 S. Ct. 270. Here it is of a shoe insert desgned to give comfort by assisting in the balance of the wearer's feet and body.

The lay reader has come or is coming to recognize the word "Cuboid" in this connection and not with any reference to the technical "orthopedic" effect of the device upon the cuboid bone.

All of our advertisements, we submit, tend to produce in the lay mind the idea that Cuboids aid foot comfort and that they help the wearer balance himself on his feet—simply that and nothing more. Actually, the Commission *did so find!*

(iii) The Commission Cannot Interpolate.

The case of *International Parts Corp. v. Federal Trade Commission,* 133 F. 2d 883, holds that the Federal Trade Commission cannot

> *"interpolate into the petitioner's representations words not there and then find the petitioner guilty of misrepresentation because the petitioner's product does not meet the Commission's revised representations."*

That is exactly what it has tried to do here—interpolate much into the advertising that is not there, and then find us guilty of untruth as to the interpolated meaning.

This, we submit, the Commission cannot do; and these advertising claims cannot be so interpreted as to say more than they do say without such interpolation.

(iv) Too Short a Rein.

The Honorable Learned Hand, while on the Bench, was one of the greatest jurists who has ever graced the American scene. In the case of *Federal Trade Commission v. Standard Educational Society,* 86 F. 2d 692 at 696, Judge Hand brings to the field which we are dis-

cussing the following concept as to the powers and duties of the Federal Trade Commission:

> ". . . its duty is to bring trade into harmony with fair dealing. *F. T. C. v. Winsted Hosiery Co.*, 258 U. S. 483, 493-494, 42 S. Ct. 384, 385, 386, 66 L. Ed. 729. To the discharge of that duty it should not, however, bring a pedantic scrupulosity. Too solicitous a censorship is worse than any evils it may correct, and a community which sells for profit must not be ridden on so short a rein that it can only move at a walk."

From all the evidence we sincerely urge that it must be concluded that our claims all have sound medical background, and each is vouched for in theory and practice by responsible, top-flight members of the medical profession, and even the Commission found that our device balances the foot. Thus, the hair-line distinctions of the Commission are far "too short a rein."

Aiding "strained, tired feet"—the Commission's admission [I R. 180] and having "no therapeutic value in the treatment of aching or painful feet" [I R. 180] are categorical denials of each other. We are left where we cannot tell what the law is—even the "law of the case." Even though the Commission's distinctions were clear and definitive [which they are NOT], we still would urge that it is "too short a rein" under all the facts of this case.

(v) No Fair Trial.

We have analyzed the evidence, the rulings of the Trial Examiner, and his attitude in general, in the earlier portions of this brief. We respectfully cite the brief of petitioner filed in this Court in the case of *Carter Products, Inc., a corporation, Petitioner v. Federal Trade Commis-*

sion, on July 14, 1952, and quote from pages 14 and 15 thereof, as follows:

"Petitioner earnestly asserts that when a government agency arrogates to itself in this fashion the functions of an arbiter of scientific and medical opinion, it behooves that agency to prove—as it has not done here—by the clearest and most convincing evidence, that the views of those in disagreement with it are unquestionably false. This is particularly true where, as here, those views are supported by a large body of respectable scientific opinion. Surely, before exercising so vast a power of censorship, condemnation and destruction of property rights, such a body, acting as complainant, prosecutor, judge and jury, should be held in the conduct of its hearings to the highest standards of fairness, impartiality and latitude in permitting cross-examination of the witnesses whom it proffers as the expert mouth-pieces of its views.

" 'Regulatory commissions have been invested with broad powers within the sphere of duty assigned to them by law. * * * All the more insistent is the need, when power has been bestowed so freely, that the "inexorable safeguard" (St. Joseph Stock Yards Co. v. United States, 298 U. S. 38, 73) of a fair and open hearing be maintained in its intergrity. Morgan v. United States, 298 U. S. 468, 480, 481; Interstate Commerce Comm'n v. Louisville & N. R. Co., *supra.* The right to such a hearing is one of "the rudiments of fair play" (Chicago, M. & St. P. Ry. Co. v. Polt, 232 U. S. 165, 168) assurred to every litigant by the Fourteenth Amendment as a minimal requirement.' "

Brinkheroff-Faris Co. v. Hill, 281 U. S. 673, 682.

If there was no fair hearing, the Court should not be disposed to speculate as to what would have been the outcome, had a fair and impartial hearing been accorded.

Inland Steel Co. v. N. L. R. B. (7 Cir.), 109 F. 2d 9;

Empire Oil & Gas Co. v. United States (9 Cir.), 136 F. 2d 868, 871;

Willapoint Oysters v. Ewing (9 Cir.), 174 F. 2d 676, cert. den. 338 U. S. 860, 70 S. Ct. 101, 94 L. Ed. 527;

Reilly v. Pinkus, 338 U. S. 269, 70 S. Ct. 110, 94 L. Ed. 63.

(vi) The Question Is of Substantial Evidence.

The case of *Universal Camera Corp. v. National Labor Relations Board,* 340 U. S. 474, 71 S. Ct. 456, 95 L. Ed. 456, is a landmark case in administrative law in the annals of American Jurisprudence. Prior to the pronouncement of that decision by the Supreme Court, the appellate courts largely had left the finding of the facts *entirely* to the administrative agencies.

The case is of such magnitude and importance that we here reproduce what we deem to be the germane portions of the Supreme Court's decision:

> "Want of certainty in judicial review of Labor Board decisions partly reflects the intractability of any formula to furnish definiteness of content for all the impalpable factors involved in judicial review. But in part doubts as to the nature of the reviewing power and uncertainties in its application derive from history, and to that extent an elucidation of this history may clear them away.

"The Wagner Act provided: 'The findings of the Board as to the facts, if supported by evidence, shall be conclusive.' Act of July 5, 1935, §10(e), 49 Stat. 449, 454, 29 U. S. C., §160(e). This Court read 'evidence' to mean 'substantial evidence.' *Washington, V. & M. Coach Co. v. Labor Board,* 301 U. S. 142, and we said that '[s]ubstantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' *Consolidated Edison Co. v. Labor Board,* 305 U. S. 197, 229. Accordingly it 'must do more than create a suspicion of the existence of the fact to be established. . . . it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.' *Labor Board v. Columbian Enameling & Stamping Co.,* 306 U. S. 292, 300.

"The very smoothness of the 'substantial evidence' formula as the standard for reviewing the evidentiary validity of the Board's findings established its currency. But the inevitably variant applications of the standard to conflicting evidence soon brought contrariety of views and in due course bred criticism. Even though the whole record may have been canvassed in order to determine whether the evidentiary foundation of a determination by the Board was 'substantial,' the phrasing of this Court's process of review readily lent itself to the motion that it was enough that the evidence supporting the Board's result was 'substantial' when considered by itself. It is fair to say that by imperceptible steps regard for the fact-finding function of the Board led to the assumption that the requirements of the Wagner Act were met when the reviewing court could find in the record evidence which, when viewed in isolation, substantiated the Board's findings. Compare

Labor Board v. Waterman Steamship Corp., 309 U. S. 206; *Labor Board v. Bradford Eyeing Assn.*, 310 U. S. 318; and see *Labor Board v. Nevada Consolidated Copper Corp.*, 316 U. S. 105. This is not to say that every member of this Court was consciously guided by this view or that the Court ever explicitly avowed this practice as doctrine. What matters is that the belief justifiably arose that the Court had so construed the obligation to review.

"Criticism of so contracted a reviewing power reinforced dissatisfaction felt in various quarters with the Board's administration of the Wagner Act in the years preceding the war. The scheme of the Act was attacked as an inherently unfair fusion of the functions of prosecutor and judge. Accusations of partisan bias were not wanting. The 'irresponsible admission and weighing of hearsay, opinion, and emotional speculation in place of factual evidence' was said to be a 'serious menace.' No doubt some, perhaps even much, of the criticism was baseless and some surely was reckless. What is here relevant, however, is the climate of opinion thereby generated and its effect on Congress. Protests against 'shocking injustices' and intimations of judicial 'abdication' with which some courts granted enforcement of the Board's orders stimulated pressures for legislative relief from alleged administrative excesses.

"The strength of these pressures was reflected in the passage in 1940 of the Walter-Logan Bill. It was vetoed by President Roosevelt, partly because it imposed unduly rigid limitations on the administrative process, and partly because of the investigation into the actual operation of the administrative process then being conducted by an experienced committee appointed by the Attorney General. It is worth noting that despite its aim to tighten control

over administrative determinations of fact, the Walter-Logan Bill contented itself with the conventional formula that an agency's decision could be set aside if 'the findings of fact are not supported by substantial evidence.'

"The final report of the Attorney General's Committee was submitted in January, 1951. The majority concluded that '[d]issatisfaction with the existing standards as to the scope of judicial review derives largely from dissatisfaction with the fact finding procedures now employed by the administrative bodies.' Departure from the 'substantial evidence' test, it thought, would either create unnecessary uncertainty or transfer to courts the responsibility for ascertaining and assaying matters the significance of which lies outside judicial competence. Accordingly, it recommended against legislation embodying a general scheme of judicial review.

"Three members of the Committee registered a dissent. Their view was that the 'present system or lack of system of judicial review' led to inconsistency and uncertainty. They reported that under a 'prevalent' interpretation of the 'substantial evidence' rule 'if what is called "substantial evidence" is found anywhere in the record to support conclusions of fact, the courts are said to be obliged to sustain the decision without reference to how heavily the countervailing evidence may preponderate—unless indeed the stage of arbitrary decision is reached. Under this interpretation, the courts need to read only one side of the case and, if they find any evidence there, the administrative action is to be sustained and the record to the contrary is to be ignored.' Their view led them to recommend that Congress enact principles of review applicable to all agencies not excepted by unique characteristics. One of these

principles was expressed by the formula that judicial review could extend to 'findings, inferences, or conclusions of fact unsupported, upon the whole record, by substantial evidence.' So far as the history of this movement for enlarged review reveals, the phrase 'upon the whole record' makes its first appearance in this recommendation of the minority of the Attorney General's Committee. This evidence of the close relationship between the phrase and the criticism out of which it arose is important, for the substance of this formula for judicial review found its way into the statute books when Congress with unquestioning —we might even say uncritical—unanimity enacted the Administrative Procedure Act.

"One is tempted to say 'uncritical' because the legislative history of that Act hardly speaks with that clarity of purpose which Congress supposedly furnishes courts in order to enable them to enforce its true will. On the one hand, the sponsors of the legislation indicated that they were reaffirming the prevailing 'substantial evidence' test. But with equal clarity they expressed disapproval of the manner in which the courts were applying their own standard. The committee reports of both houses refer to the practice of agencies to rely upon 'suspicion, surmise, implications, or plainly incredible evidence,' and indicate that courts are to exact higher standards 'in the exercise of their independent judgment' and on consideration of 'the whole record.'

"Similar dissatisfaction with too restricted application of the 'substantial evidence' test is reflected in the legisaltive history of the Taft-Hartley Act. The bill as reported to the House provided that the 'findings of the Board as to the facts shall be conclusive unless it is made to appear to the satisfaction of the court either (1) that the findings of fact are

against the manifest weight of the evidence, or (2) that the findings of fact are not supported by substantial evidence.' The bill left the House with this provision. Early committee prints in the Senate provided for review by 'weight of the evidence' or 'clearly erroneous' standards. But, as the Senate Committee Report relates, 'it was finally decided to conform the statute to the corresponding section of the Administrative Procedure Act where the substantial evidence test prevails. In order to clarify any ambiguity in that statute, however, the committee inserted the words "questions of fact, if supported by substantial evidence *on the record considered as a whole.* . . ."'

"This phraseology was adopted by the Senate. The House conferees agreed. They reported to the House: 'It is believed that the provisions of the conference agreement relating to the courts' reviewing power will be adequate to preclude such decisions as those in *N. L. R. B. v. Nevada Consol. Copper Corp.* (316 U. S. 105) and in the *Wilson, Columbia Products, Union Pacific Stages, Hearst, Republic Aviation,* and *Le Tourneau, etc.,* cases, *supra,* without unduly burdening the courts.' The Senate version became the law.

"It is fair to say that in all this Congress expressed a mood. And it expressed its mood not merely by oratory but by legislation. As legislation that mood must be respected even though it can only serve as a standard for judgment and not as a body of rigid rules assuring sameness of application. Enforcement of such broad standards implies subtlety of mind and solidity of judgment. But it is not for us to question that Congress may assume such qualities in the federal judiciary.

"From the legislative story we have summarized, two concrete conclusions do emerge. One is the identity of aim of the Administrative Procedure Act and the Taft-Hartley Act regarding the proof with which the Labor Board must support a decision. The other is that now Congress has left no room for doubt as to the kind of scrutiny which a Court of Appeals must give the record before the Board to satisfy itself that the Board's order rests on adequate proof.

"It would be mischievous word-playing to find that the scope of review under the Taft-Hartley Act is any different from that under the Administrative Procedure Act. The Senate Committee which reported the review clause of the Taft-Hartley Act expressly indicated that the two standards were to conform in this regard, and the wording of the two Acts is for purposes of judicial administration identical. And so we hold that the standard of proof specifically required of the Labor Board by the Taft-Hartley Act is the same as that to be exacted by courts reviewing every administrative action subject to the Administrative Procedure Act.

"Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitively precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement in both statutes that courts consider the whole record. Committee reports and the adoption in the Adminis-

trative Procedure Act of the minority views of the Attorney General's Committee demonstrate that to enjoin such a duty on the reviewing court was one of the important purposes of the movement which eventuated in that enactment."

This has been commented upon very succinctly in *Securities and Exchange Commission v. Cogan* (9th Cir., 1951), 201 F. 2d 78, in a decision which, in part, reads as follows:

". . . In Universal Camera Corp. v. Labor Board, 340 U. S. 474, 71 S. Ct. 456, 95 L. Ed. 456, the Supreme Court had occasion to discuss at length the extensive criticisms of what Congress and the members of the bar had come to regard as too contracted a reviewing power in the courts with respect to administrative orders. The court noted the reports of various committees expressing dissatisfaction with the existing standards as to the scope of judicial review and after reference to the committee reports concluded that by the adoption of the Administrative Procedure Act (as well as by the adoption of the Taft-Hartley Act, 29 U. S. C. A., §141 *et seq.*, which was there involved), Congress had 'expressed a mood' that in the future courts must assume more responsibility for review of administrative orders than they had in the past. Of course the Universal Camera case was dealing with the problem of an enlarged review of fact determinations. But we would blind ourselves to reality if we did not recognize that the extensive criticisms of the courts which led to the adoption of the Administrative Procedure Act were not limited to the courts' failure to function merely in cases involving fact determination.

"In enacting the Administrative Procedure Act, Congress did not merely express a mood that questions of law are for the courts rather than agencies to decide,—it so enacted with explicit phraseology. Section 10 provides: 'Except so far as (1) statutes preclude judicial review, or (2) agency action is by law committed to agency discretion—[neither of these exceptions applies here] * * * (e) Scope of review. So far as necessary to decision and where presented *the reviewing court shall decide all relevant questions of law,* interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, *or otherwise not in accordance with law* * * *.' (Emphasis supplied.) As the Congressional committees stated in reporting the bill: 'This subsection provides that questions of law are for courts rather than agencies to decide in the last analysis and it also lists the several categories of questions of law.' Surely this Act gives no warrant for any strained extension of the doctrine of the second Chenery case to the facts here."

We present these as indicative of a trend.

Under the doctrine of the *Universal Camera Corporation* case, and some other cases following it, notably:

Natoinal Labor Relations Board v. Associated Drygoods, 209 F. 2d 593;

Motion Picture Ad Service v. Federal Trade Commission, 194 F. 2d 633;

Carter Products v. Federal Trade Commission (9th Cir.), 201 F. 2d 446,

we believe the trend is that the reviewing courts may and will look critically at the evidence adduced before the Commission to determine whether or not there is substantial evidence to support the findings of the Commission.

This, as contradistinguished from the old scintilla rule, as shown by the *Universal Camera* case.

Not applicable here because the statute (F. T. C. Act), provides otherwise, but very illustrative of this trend, is the new proposed amendment to Rule 452 of the Rules of Civil Procedure for United States District Court as prepared by the Advisory Committee on Rules for Civil Procedure. While it is not the law unless passed, it is, we believe, germane to quote the new proposal (p. 45):

> "Findings of fact shall not be set aside unless clearly erroneous. In the application of this principle, regard shall be given to the special opportunity of the trial court to judge the credibility of those witnesses who appeared personally before it."

The comment of the Committee sets forth that the amendment is designed to correct a judicial glossing over upon the rule which had tended to distort it. The Committee states:

> "The stated test that findings of fact shall not be set aside 'unless clearly erroneous' obviously grants a considerable discretion to the trial or reviewing court . . .
>
> "The Supreme Court in applying this rule has said, 'A finding is clearly erroneous when, *although there is evidence to support it,* the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.' " (Italics ours.)

See:

United States v. United States Gypsum Co., 333 U. S. 364, 395;

United States v. Yellow Cab Co., 338 U. S. 338;

United States v. Oregon State Medical Society, 343 U. S. 326;

Dalehite v. United States, 346 U. S. 15, 24, 42, 54;

Gindorff v. Prince (2d Cir.), 189 F. 2d 897.

See also:

Smyth v. Barneson (9th Cir.), 181 F. 2d 143, 144.

See also:

Scope of Appellate Fact Review Widened, 2 Stan. L. Rev. 784.

It is particularly interesting to observe in this connection that as a matter of practical effect, the Court here is in exactly the same position to weigh the evidence, as was the Commission. In many cases with respect to review of decisions of courts, as distinguished from administrative agencies, it has of late been held (in keeping with and as part of the trend which we believe we delineate), that where the testimony before the trial court was by deposition or the evidence was entirely documentary, the reviewing court is in as good a position as was the trial judge to evaluate it. Cases on this point are:

Fleming v. Palmer (1st Cir.), 123 F. 2d 749, cert. den. 316 U. S. 662;

Banister v. Solomon (2d Cir.), 126 F. 2d 740;

Ball v. Paramount Pictures, Inc. (3d Cir.), 169 F. 2d 317;

Penn. etc. v. Crapet (5 Cir.), 199 F. 2d 850;

Himmel Bros. Co. v. Serrick Corp. (7th Cir), 122 F. 2d 740;

State Farm Mutual Auto Ins. Co. v. Bonacci (8th Cir.), 111 F. 2d 412;

Smyth v. Barneson (9th Cir.), 181 F. 2d 143.

So at this time there should be no doubt we submit, of the powers of the Court with respect to administrative rulings.

IX.
CONCLUSION.

It is respectfully submitted in conclusion: that this Court has jurisdiction; that the specifications of error are well taken; that there was no fair trial; that Petitioner's advertising claims are true; that the findings of the Commission are not supported by substantial evidence; and that, therefore, the Order of the Commission should be set aside.

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